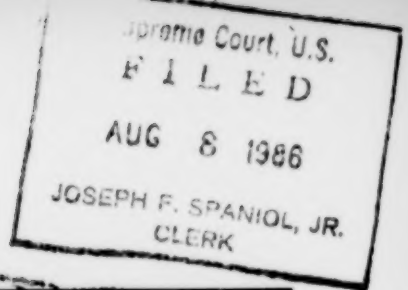


No. 85-1259



IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD LUNN TULL,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

**On Writ of Certiorari to the United States
Court of Appeals for the Fourth Circuit**

JOINT APPENDIX

RICHARD R. NAGEOTTE
NAGEOTTE, BORINSKY & ZELNICK
14908 Jefferson Davis Hwy.
Woodbridge, Virginia 22191-3997
(703) 491-4136
Counsel for Petitioner

CHARLES FRIED
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel for Respondent

PETITION FOR CERTIORARI FILED JANUARY 24, 1986
CERTIORARI GRANTED MAY 27, 1986

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
VOLUME I		
1981		
July 1	1	Complaint.
July 2	—	Summons issued with 1 copy, delivered to Marshal with Magistrate's Notices.
July 24	2	Summons returned executed 7/22/81.
Aug. 5	3	Interrogatories on behalf of plaintiff.
Aug. 5	4	Request for production of documents on behalf of plaintiff.
Aug. 5	5	Requests for admission on behalf of plaintiff.
Aug. 5	6	Request for entry upon land on behalf of plaintiff.
Aug. 11	7	Motion for more definite statement on behalf of defendant.
Aug. 11	8	Demand for jury trial on behalf of defendant.

DATE	NR.	PROCEEDINGS
1981		
Aug. 11	9	Memorandum in support of demand for jury trial, received.
Aug. 28	10	Motion for protective order on behalf of defendant.
Aug. 28	11	Memorandum of law in support of motion for protective order, received.
Sep 3	12	Memorandum in opposition to defendant's motion for a jury trial, received.
Sep 3	13	Opposition to motion for more definite statement on behalf of plaintiff, received.
Sep 8	14	Memorandum in opposition to defendant's motion for protective order and memorandum, received.
Sep 10	15	Order denying defendant's motion for a more definite statement; denying defendant's motion for a jury trial, entered Sept. 9, 1981 & filed Sept. 10, 1981. JAM, j. Copies to counsel by judge's office.
Sep 14	16	Affidavit in support of motion for protective order on behalf of defendant.
Oct 1	17	Memorandum reply to plaintiff's memorandum in opposition to defendant's motion for protective order and memorandum, received.
Oct 16	—	Trial proceedings: JAM, j. Repr. R. Zahn. Counsel appeared. Matter came on for hearing on motion for protective order. Arguments of counsel heard. Court takes matter under advisement. Court directed
	18	defendant's answer and grounds of defense, answer to interrogatories, answer
	19	to plaintiff's request for production of
	20	

DATE	NR.	PROCEEDINGS
1981		
	21	documents and answers to plaintiff's requests for admission heretofore received be filed.
Nov 3	22	Opinion and order that defendant comply with plaintiff's demand for entry onto land; defendant is ordered to answer plaintiff's interrogatories numbered one, two, and three. Defendant is ordered to produce all those documents in his possession, custody or control necessary to comply with plaintiff's requests for production numbered one, two, three, and sixteen. Defendant must also comply with request for production thirteen, except insofar as any of the requested documents relate to fill materials or physical description of the subject properties, as to all other discovery demands of pltf., defendant's motion for a protective order is granted, entered Oct. 31, 1981 & filed November 3, 1981. Copies mailed by judge's office. JAM, j.
1982		
Jan. 7	23	Interrogatories on behalf of defendant.
Jan. 7	24	Request for production of documents on behalf of defendant.
Jan. 11	25	Supplemental interrogatories to defendant on behalf of plaintiff.
Jan. 11	26	Supplemental request for production of documents to defendant on behalf of plaintiff.
Jan 27	27	Order on initial pretrial conference, trial date July 27, 1982; final pretrial conference July 9, 1982 at 12:00 noon; all de bene esse depositions shall be concluded

DATE	NR.	PROCEEDINGS
1982		on or before June 18, 1922; pltf. to complete discovery on or before May 4, 1982; deft. on or before June 4, 1982; parties shall file a formal statement of the issues on or before Jan. 18, 1982; deft. to answer or respond on or before Jan. 22, 1982 (as set forth in Judge MacKenzie's order of October 31, 1981); any amended complaint shall be filed on or before Jan. 22, 1982; the court notes the agreement of counsel that Mr. Kane may inspect the property in question; any motion for summary judgment shall be filed, with supporting memorandum, on or before June 18, 1982, with response due on or before June 28, 1982. If no hearing is requested by June 29, the Clerk shall refer the file on June 30 to one of the judges for decision on any motion for summary judgment, entered Jan. 7, 1982 & filed Jan. 27, 1982.
Mar 19	28 29	Motion to compel discovery on behalf of defendant. Memorandum, received.
Mar 19	30	Statement required by local rule 11.1(J) on behalf of defendant.
Mar 24	31	Application of the United States for a grant of immunity to Edward Lunn Tull.
Mar 24	32	First motion to compel on behalf of plaintiff.
Mar 24	33	Memorandum in support of plaintiff's first motion to compel, received.
Mar 24	34	Second motion to compel on behalf of plaintiff.
Mar 24	35	Memorandum in support of plaintiff's second motion to compel, received.

DATE	NR.	PROCEEDINGS
1982		
Mar 24	36	Notice of deposition on behalf of plaintiff.
Mar 26	37	Notice to take deposition on behalf of plaintiff.
Mar 31	38	Notice of hearing to compel discovery on behalf of defendant.
Apr 1	39	Notice to take deposition on behalf of plaintiff.
Apr 2	—	Trial Proceedings: JAM, j. Rep., D. Zahn. Matter came on for hearing on motions to compel, etc. Arguments of counsel. Court's rulings stated in record. Order entered and filed re a grant of immunity to Edward Lunn Tull. Court directed that all motions, answers, etc. heretofore "lodged" be filed.
Apr 2	40	Order directing Edward Lunn Tull to testify and provide information in response to interrogatories, depositions and at trial; further that none of his testimony or other information so compelled by this Order or any information directly or indirectly derived from such testimony or other information may be used against the Edward Lunn Tull in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this Court's Order; further that if Tull refuses to testify and provide other information during the course of the grand jury's inquiry the Court will hear and receive an application for an Order holding Edward Lunn Tull in contempt, entered & filed April 2, 1982. JAM, j.
Apr 2	41	First amended complaint on behalf of plaintiff.

DATE	NR.	PROCEEDINGS
1982		
Apr 2	42	Answer to interrogatories on behalf of defendant.
Apr 2	43	Answer to request for production of documents on behalf of defendant.
Apr 2	44	Answer to defendant's request for production of documents on behalf of plaintiff.
Apr 2	45	Answers to defendant's interrogatories on behalf of plaintiff.
Apr 2	46	Response to plaintiff's supplemental interrogatories to defendant.
Apr 2	47	Supplemental answers to defendant's interrogatories on behalf of plaintiff.
Apr 12	48	Order directing defendant to respond to discovery, etc., entered & filed April 2, 1982. JAM, j.
Apr 21	49	(3) Notice to take deposition on behalf of plaintiff.
Apr 22	—	Transcript of proceedings of April 2, 1982.
Apr 23	50	Notice of deposition on behalf of plaintiff.
May 3	51	Motion for a temporary restraining order and temporary injunction on behalf of the plaintiff.
May 3	52	Affidavit of Gerald D. Tracy.
May 3	53	Affidavit of Douglas Davis.
May 3	54	Memorandum in support of the motion for temporary restraining order and for a temporary injunction on behalf of the plaintiff received.
May 3	55	Supplemental respond to defendant's interrogatory #3 on behalf of the plaintiff.

DATE	NR.	PROCEEDINGS
1982		
May 3	56	Response by United States for request for production of a report on a meeting between the parties.
May 4	57	Supplemental response to defendant's interrogatory #9 on behalf of plaintiff.
May 7		Trial Proceedings: JCC, Jr., j. Ct. Rept. H. Weiss. Counsel appeared. Came on for hearing of motion for temporary restraining order and for temporary injunction on behalf of the plaintiff. Evidence of plaintiff heard. Motion of defendant for a directed verdict argued. Denied. Findings from bench. Judgment: Defendant enjoined until trial of this case on merits or until further order of this court. Counsel will present order. Order effective from time of ruling.
May 7	58	Order directing Edward Lunn Tull and his agents and employees and contractors hired by him to forthwith cease and desist from depositing of sand or other fill material on property known as Mire Pond Two which is located to the north of Mire Pond Camper Site and which is adjacent to Fowling Gut on the Island of Chincoteague, Virginia; directing Edward Lunn Tull to cease and desist until this case is heard on its merits at trial and judgment ordered of until further order of this court, entered & filed May 7, 1982. JCC, Jr., j. Six certified copies given to Jack Kane/U.S. Attorney—he wants to distribute to all parties. o.b.
May 13	59	Order granting defendant, Edward Lunn Tull, leave to file a late answer to the first

DATE	NR.	PROCEEDINGS
1982		
		amended complaint of plaintiff, entered & filed May 13, 1982. Copies mailed 5/13/82.
May 13	60	Answer to first amended complaint of plaintiff.
May 14	61	Notice of the taking of depositions on behalf of defendant.
May 19	62	Amended notice of the taking of depositions on behalf of defendant.
May 19	63	Supplemental answers to defendant's interrogatories on behalf of plaintiff.
May 28	64	Notice of the taking of depositions on behalf of defendant.
Jun 4	65	Third motion to compel on behalf of plaintiff.
Jun 4	66	Motion for a protective order on behalf of defendant.
Jun 14		Transcript of hearing on temporary restraining order held on May 7, 1982.
Jun 14		Depositions of William S. Sipple, Richard Summer, John R. Pomponio and Gene Silberhorn, received.
Jun 14		Depositions of John W. Clay, Milton L. McCarthy, Gene Cocke and Richard Sumner, received.
Jun 14	67	Notice of the taking of Depositions, etc., on behalf of the defendant.
June 17	68	Response to plaintiff's motion for a protective order on behalf of defendant.
June 17	69	Response to plaintiff's third motion to compel on behalf of defendant.

DATE	NR.	PROCEEDINGS
VOLUME II		
1982		
Jun 18	70	Motion to recuse the Honorable J. Calvitt Clarke, Jr. on behalf of defendant.
Jun 18	71	Affidavit in support of the motion to recuse on behalf of defendant.
Jun 18	72	Memorandum of law in support of motion to recuse on behalf of defendant, received.
Jun 18	73	Motion for partial summary judgment on behalf of defendant.
Jun 18	74	Affidavit in support of motion for partial summary judgment on behalf of defendant.
Jun 18	75	Memorandum of law in support of motion for partial summary judgment on behalf of defendant, received.
Jun 21		Depositions of Don T. Turner, John Graham Nock and Charles Morris Powell, received.
Jun 23	76	Supplemental answer to defendant's interrogatory No. 1 on behalf of plaintiff.
Jun 28	77	Motion to bifurcate trial on behalf of plaintiff.
Jun 28	78	Affidavit in support of the motion to recuse the Honorable J. Calvitt Clarke, Jr., on behalf of defendant.
Jul 2	79	Motion for extension of time on behalf of plaintiff.
Jul 2	80	Memorandum in opposition to defendant's motion to recuse the Honorable J. Calvitt Clarke, Jr., received.
Jul 2	81	Memorandum in opposition to defendant's motion for partial summary judgment, received.

DATE	NR.	PROCEEDINGS
1982		
Jul 6	82	Memorandum in opposition to plaintiff's motion to bifurcate trial, received.
Jul 7	83	Order denying defendant's motion for recusal, entered & filed July 7, 1982. JCC, Jr., j. Copies mailed 7/7/82 by judge's office.
Jul 8	84	Affidavit in support of the motion to recuse the Honorable J. Calvitt Clarke, Jr.
Jul 8		Deposition of David Adams, received.
Jul 9	85	Order on final pretrial conference, entered in the presence of counsel, entered July 9, 1982. RBK, j.
Jul 12	86	Affidavit in support of renewed motion to compel discovery and motion for an order directing plaintiff's witnesses to answer questions propounded to them in discovery.
July 12	87	Renewed motion to compel discovery and motion for an order directing plaintiff's witnesses to answer questions propounded to them in discovery.
Jul 12	88	Memorandum in support of motion to compel discovery and motion for an order directing plaintiff's witnesses to answer questions propounded to them in discovery, received.
Jul 12	89	Memorandum in rebuttal of motion for partial summary judgment on behalf of defendant, received.
Jul 12	90	Opinion and order denying the defendant's motion for partial summary judgment, entered & filed July 12, 1982. JCC, Jr., j. Copies to counsel by judge's office 7/12/82.

DATE	NR.	PROCEEDINGS
1982		
Jul 16		Deposition of Alexander Dolgos, received.
Jul 16		Deposition of Bruce F. Williams, received.
Jul 16		Deposition of Robert L. Oswald, received.
Jul 16		Deposition of Joseph R. Loschi, received.
Jul 22	91	Amended answer to plaintiff's interrogatories on behalf of defendant. (witnesses).
Jul 22	92	Amended answer to plaintiff's interrogatories on behalf of defendant. (exhibits).
Jul 22		Deposition of Julien R. Hume, III, received.
Jul 26		Summary of deposition of Edward Lunn Tull, April 7, 1982, received.
Jul 26		Summary of deposition of James Ballard, April 27, 1982, received.
Jul 26		Summary of deposition of Donald Lee Ballard, April 27, 1982, received.
Jul 26		Summary of deposition of Klein G. Leister, April 27, 1982, received.
Jul 26		Summary of deposition of Alexander J. Justice, April 27, 1982, received.
Jul 26		Summary of deposition of Ronald L. Beebe, April 28, 1982, received.
Jul 26		Summary of deposition of Edward Lunn Tull, April 28, 1982, received.
Jul 26	93	Motion to amend final pretrial order on behalf of plaintiff.
Jul 26	94	Proposed findings of fact and conclusions of law on behalf of defendant, received.
Jul 27		COURT PROCEEDINGS: RGD, j. Rep. Repr. C. Barnes. Plaintiff represented by

DATE	NR.	PROCEEDINGS
1982		
		Diane Donley, John F. Kane and Benjamin Kalkstein. Defendant represented by Richard R. Nageotte. Parties and counsel appeared. On motion, witnesses were excluded. Opening statements of counsel heard. Plaintiff presented evidence in part. Court adjourned until tomorrow at 9:30 a.m.
Jul 28		COURT PROCEEDINGS: Continuation of court trial. Parties & counsel appeared pursuant to adjournment yesterday. Plaintiff resumed presentation of evidence in part. Further proceedings continued until September 20, 1982 at 9:00 a.m.
Sep. 3	95	Motion to release exhibits No. 20, 42, 43, and 44 on behalf of plaintiff.
Sep. 3	96	Order releasing slides of exhibits 20, 42, 43 and 44 to the United States and be returned at the time that the trial of the action commences again; any prints of exhibits 20, 42, 43 and 44 should be retained by the Clerk, filed Sept. 3, 1982. RGD, j. Copies mailed to counsel.
Sep. 20	97	Memorandum of law on behalf of plaintiff, received 9/20/82.
Sep. 22	98	Memorandum of law on behalf of plaintiff, received 9/22/82.
Sep. 20		Trial Proceedings: RGD, j. Rep. C. Barnes. (proceedings in Wallops Island, Va.). Continuation of trial proceedings. Appearances—Jack Kane, Diane Donnelly, Benjamin Kalkstein on behalf of plaintiff. Richard R. Nageotte—behalf of defendant Edward Lunn Tull. Came on for

DATE	NR.	PROCEEDINGS
1982		
		further trial proceedings. By agreement, defendant presented evidence in part. Plaintiff resumed presentation of evidence. Note—Court, counsel and parties viewed property on Chincoteague Island. Further proceedings continued until tomorrow at Norfolk at 10:15 a.m. Court adjourned.
Sep. 21		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of trial proceedings. Parties and counsel appeared pursuant to adjournment yesterday. Plaintiff resumed presentation of evidence. Further proceedings continued until tomorrow morning at 10:00 a.m.
Sep. 22		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment yesterday. Plaintiff resumed presentation of evidence. Further proceedings continued until tomorrow morning at 10:15 a.m.
Sep. 23		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment yesterday. Plaintiff resumed presentation of evidence. Deft. moved for mistrial—Denied. Court adjourned until Monday morning at 11:00 a.m. (9/27/82).
Sep. 27		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment on 9/23/82. Plaintiff resumed presentation of evidence, and rested. Deft. moved for directed verdict and for summary judgment—RULING WITHHELD. Plain-

DATE	NR.	PROCEEDINGS
1982		
		tiff moved to amend—RULING WITHHELD. Further proceedings continued until tomorrow morning at 10:00 a.m.
Sep. 28		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment yesterday. Comments of Court heard. Court will allow plaintiff re re-open case and will grant leave to amend. Plaintiff to file amendment within 7 days. Court will server this trial as to Ocean Breeze. Trial as to Ocean Breeze re-set for 11-22-82. Plaintiff to supplement answers to interrogatories within 2 weeks Deft. moved for mistrial—DENIED. Deft. presented evidence in part. Court adjourned until tomorrow morning at 9:30 a.m. (9/29/82).
Sep 29		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of Court Trial. Parties & counsel appeared pursuant to adjournment yesterday. Deft. resumed presentation of evidence. Further proceedings continued until Tuesday, 10-5-82 at 10:00 a.m.
Oct 5	99	Second amended complaint.
Oct 6	100	Interrogatories on behalf of defendant. S: hd10/5/82. (filed by Court)
Oct 6	101	Request for production of documents on behalf of defendant. S: hd10/5/82. (filed by Court)
Oct 6	102	Request for admissions on behalf of defendant filed by Court. S:hd10/5/82.
Oct 5		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of court trial. Parties &

DATE	NR.	PROCEEDINGS
1982		
		counsel appeared pursuant to adjournment on 9-29-82. Deft. resumed presentation of evidence in part. Court adjourned until tomorrow morning at 10:00 a.m.
Oct 6		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of court trial. Parties & counsel appeared pursuant to adjournment yesterday. Deft. resumed presentation of evidence in part. Further proceedings continued until tomorrow morning at 9:30 a.m.
Oct 7		Trial Proceedings: RGD, j. Rep. C. Barnes. Continuation of court trial. Parties and counsel appeared pursuant to adjournment of last evening (10/6/82). Deft. resumed presentation of evidence and rested with exception of deposition to be taken. Plaintiff presented rebuttal evidence in part. Resumes of James R. Hubbard received. Further proceedings continued until November 22, 1982.
Oct 8	103	Memorandum of law supporting defendant Tull's standing to challenge the constitutionality of the statute, received.
Oct 25	104	Supplemental responses to defendant's interrogatories 6, 7 and 8 on behalf of plaintiff.
Oct 26	105	Amended request for admissions on behalf of defendant filed by Court.
Oct 26	106	Answer and grounds of defense to second amended complaint on behalf of defendant, filed by Court.
Oct 27	107	Letter appointing expert witness, Professor Donna Ware (fee to be taxed).

DATE	NR.	PROCEEDINGS
1982		
Nov 4	108	Answers to defendant's interrogatories on behalf of plaintiff.
Nov 4	109	Responses to defendant's amended requests for admissions on behalf of plaintiff.
Nov 4	110	Response to defendant's request for production of documents on behalf of plaintiff.
Nov 15		Excerpt from deposition of Mark J. Harrell, received.
Nov 19		Deposition of Julien Robert Hume, III on behalf of defendant, received.
Nov 22		Trial Proceedings: RGD, j. Ct. Rep. C. Barnes. Continuation of trial. Mr. John Kane, AUSA and Mrs. Diane L. Donley AUSA; deft. present with his counsel Mr. Richard Nageotte. Matter came on for continuation of trial. Plaintiff resumed presentation of rebuttal evidence. Plaintiff rested. Deft. presented evidence in part. Court adjourned until tomorrow morning at 10:00 a.m. (11/23/82).
Nov 23		Trial Proceedings: RGD, j. Ct. Rep. C. Barnes. Parties and counsel appeared pursuant to adjournment of last evening (11/22/82). Deft. resumed presentation of evidence. Deposition of Gene Silberhorn read in open court. Deft. rested. Courts expert Dr. Donna M. E. Ware testified. Plaintiff presented rebuttal evidence in part. Court adjourned until tomorrow morning at 10:00 a.m.
Nov 24		Trial Proceedings: RGD, j. Ct. Rep. C. Barnes. Parties and counsel appeared pursuant to adjournment of last evening (11/23/82). Plaintiff resumed presenta-

DATE	NR.	PROCEEDINGS
1982		
		tion of rebuttal evidence and rested. Final arguments of counsel heard. Court takes matter under advisement. Counsel to submit finding of facts and conclusions of law in 21 days.
Dec. 14	111	Order extending the time for filing proposed findings of fact to Dec. 22, 1982, entered & filed Dec. 14, 1982. RGD, j. Copies to counsel.
Dec. 22	112	Additional proposed findings of fact and conclusions of law on behalf of defendant, received.
Dec. 27	113	Findings of fact on behalf of plaintiff, received.
Dec. 27	114	Post-trial brief on behalf of plaintiff, received.
1983		
Sep 12	115	Petition to enter an order vacating temporary injunction on behalf of defendant.
	116	Notice of hearing. Memorandum in support of petition, received.
	117	
Sep 26	118	Praeipie on behalf of defendant.
Sep 28		TRIAL PROCEEDINGS: RGD, j. Ct. rep. C. Barnes. John F. Kane, Asst. U.S. Attorney, Diane L. Donley & Benjamin Kalstein appeared on behalf of the U.S. Defendant appeared with counsel, Richard Nageotte. Came on for presentation of Court's opinion. Comments of Court and counsel heard. Court set supersedeas bond in the amount of \$150,000.00 Court adjourned.

DATE	NR.	PROCEEDINGS
1983		
Sep 30	119	Opinion and order, entered & filed Sept. 28, 1983. RGD, j. Copies hand-delivered to counsel by judge's office.
Sep 30	120	Order granting judgment in favor of the United States of America against the defendant and total penalties (or civil fines) in the sums of \$35,000, \$35,000.00 and \$5,000.00; further directing defendant to remove from fill and/or restore certain lots to wetlands as provided therein; and directing payment of a fine in the sum of \$250,000.00 with provision for filing an election within 10 days, etc., defendant shall post a penalty bond with a corporate surety approved by the Clerk in the sum of \$300,000.00 with certain conditions as set forth therein; permanently enjoining and filling of any kind of lots 8(A), 9(A), 10(A), 11(A), 12(A), 13(A) and 22(A) in Mire Pond Section II * * *; and further directing that the chargeable costs be borne by the defendant, including there-with an \$800.00 expert witness fee to be paid to Professor Donna M. E. Ware, etc., any request for attorney's fees and expenses shall be filed within 10 days; and any prior injunction herein shall be null and void upon the entry of and compliance with this order, entered & filed Sept. 28, 1983. RGD, j. Copies hand-delivered to counsel by judge's office. o.b.

VOLUME III

Oct 7	121	Motion for a new trial on behalf of defendant.
	122	Memorandum in support of motion, received.

DATE	NR.	PROCEEDINGS
1983		
Oct 11	123	Order staying part and portions of the judgment decree of this Court entered 9/28/83; conditioned upon posting of a supersedeas bond in the sum of \$150,000.00, in cash or with comp. surety and granting 21 days to submit any add. financial info., etc., for reduction of this bond, etc.; and extending the time for election as to restoration of Fowling Gut, entered Oct. 6, 1983 & filed Oct. 7, 1983. RGD, j. Copies mailed by judge's office.
Oct 11	124	Motion for payment of attorneys fee on behalf of plaintiff.
Oct 11	125	Motion for payment of deposition costs and extension of time for submission and of itemization of deposition cost on behalf of plaintiff.
Oct 11	126	Bill of costs on behalf of plaintiff.
Oct 18	127	Order directing clerk to accept as bond in this case, in lieu of cash, certificates of deposit in the total sum of One Hundred Fifty Thousand Dollars (\$150,000.00), etc.; further directing that all interest earned on the said certificates of deposit shall be paid by the banks when earned directly to the defendant, etc.; and directing this order shall not otherwise modify the previous orders of this Court except as set forth specifically herein, entered & filed Oct. 18, 1983. RGD, j. Copy to Mr. Kane & Mr. Tull's representative. certified copies to J. Stapleford, financial section, Marine Bank & F & M Bank. o.b.
Oct 18	128	Bond, with 2 certificates of deposit, as security filed.

DATE	NR.	PROCEEDINGS
1983		
Oct 19	129	Brief in opposition to defendant's motion for a new trial on behalf of plaintiff, received.
Nov 4	130	Petition on behalf of defendant. Memorandum in support of petition for relief, received.
	131	
Nov 16	132	Response to petition of defendant on behalf of plaintiff.
Dec 16		COURT PROCEEDING: RGD, j. Rep. C. Barnes. Counsel appeared. Came on for hearing re defts. petition. Comments of counsel & court heard. (Court takes under advisement as to motion for new trial), Defts. petition is Denied.
1984		
Jan 5	133	Order denying defendant's petition for relief from the final judgment entered by this Court on Sept. 28, 1983; allowing the defendant 30 days from the date hereof in which to elect whether to restore the waterway or pay the fine, entered & filed Jan. 5, 1984. RGD, j. Copies mailed by judge's office.
Jan 5	134	Judgment on decision by the court, that defendant's petition for relief from the final judgment entered by this Court on September 28, 1983 is DENIED, entered by clerk Jan. 5, 1984. Certified copies to counsel. o.b.
Jan 11	135	Motion to alter or amend judgment on behalf of defendant. Memorandum in support of motion, received.
	136	
Jan 12	137	Motion for rehearing on behalf of defendant.
	138	Memorandum in support of motion, received.

DATE	NR.	PROCEEDINGS
1984		
Jan 12	139	Affidavit of Richard R. Nageotte.
Jan 12	140	Affidavit of Edward Lunn Tull.
Jan 12	141	Affidavit of Ronald Beebe.
Feb 6	142	Opposition to motion for rehearing on behalf of plaintiff.
Feb 6	143	Response to motion to alter or amend judgment on behalf of plaintiff.
Feb 10	144	Supplemental opposition to defendant's motion for a new trial on behalf of plaintiff.
Feb 14	145	Response to plaintiff's response to motion to alter or amend judgment on behalf of defendant.
Feb 14	146	Response to plaintiff's opposition to motion for rehearing on behalf of defendant.
Feb 16	147	Order denying defendant's motion to alter or amend the judgment of this Court entered on January 5, 1984 and denying defendant's motion for a rehearing of the Court's previous denial of Tull's petition for relief, entered & filed Feb. 16, 1984. RGD, j. Copies mailed by judge's office.
Jun 1		Transcript of court proceedings before the Honorable Robert G. Doumar on December 16, 1983.
Jun 26	148	Order denying defendant's motion for a new trial filed on October 7, 1984, advising defendant that the time for appeal will run from the date of this order, entered & filed June 26, 1984. RGD, J. Copies mailed by judge's office.
Jun 26	149	Judgment on decision by the court, that defendant's motion for a new trial is Denied,

DATE	NR.	PROCEEDINGS
1984		
		entered by clerk June 26, 1984 & filed. Certified copies to counsel o.b.
July 5	150 150A	Motion to reconsider denial of new trial on behalf of defendant. Brief in support of motion, received.
July 6		(15) transcripts of trial.
July 13	151	Order denying defendant's motion for recon- sideration, entered & filed July 13, 1984. RGD, j. Copies mailed by judge's office.
July 13	152	Judgment on decision by the Court, that de- fendant's motion for reconsideration is Denied, entered by clerk July 13, 1984 & filed. Certified copies mailed. o.b.
July 19	153	Notice of appeal on behalf of defendant.
July 20	—	Conformed copy of notice of appeal mailed to clerk, U.S. Court of Appeals, (with copy of docket entries) and to Richard Nage- otte (hand-delivered 10B notice 7/19/84), and John F. Kane and Diane L. Donley, attorneys for plaintiff.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Docket No. 84-1766

UNITED STATES OF AMERICA,
v. *Appellee*,
EDWARD LUNN TULL,
Appellant.

RELEVANT DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
07-25-84	Case docketed. ROA filed. ses
07-25-84	BRIEFING ORDER, filed. A due 09-04-84. Ten- tative argument set for 1984 November session. ses
07-31-84	DISCLOSURE STMNT, A, N, filed. ses
08-03-84	DESIGNATION, A, parts of record to be included in appendix, filed. ses
8/10/84	MOTION (H-52) of E for additional time to file brief, filed (BMM:jm) Motion deferred until filing of A's brief and joint appendix
08-13-84	DESIGNATION, E, parts of record to be included in appendix, filed. ses
9/4/84	MOTION (I-17) of A to include Addendum A and B in his brief, filed (BMM:jm)
9/10/84	ORDER extending the time to file E's brief to 10/25/84, filed (BMM:jm) Copy to Nageotte; Kane; Kalkstein; Donley; Matzen-McGuire
9/18/84	Response of E to motion I-17 of A, filed. jd

DATE	FILINGS—PROCEEDINGS
9/19/84	LTR denying motion I17. (BMM:jd) Copy to counsel.
10/19/84	MOTION of E for ext. of time (J-141) to file brf, filed. jd
10/22/84	ORDER granting motion J-141. E's brf due 11/1/84. (BMM:jd) Copy to counsel.
10/23/84	OPPOSITION of A to motion for extension of time, filed (SAR:jm)
11/14/84	MOTION of A (K-81) that the rules be waived so as to permit the filing of a large photograph as a part of his reply brf, filed. MOTION DENIED on 11/15/84. (BMM:jd) Copy to counsel.
12/6/84	MOTION of E that pages seven and twenty-four be deleted from A's reply brf., or, in the alternative that it be granted leave to respond in writing, filed. jd
12/7/84	Response of A to E's motion of 12/6/84, filed. jd
12/10/84	ORDER denying motion of 12/6/84. (BBM:jd) Copy to counsel. . .
5/29/85	JOINT MOTION to release plaintiff's Exhibits No. 1, 1A, 2, 2A, 2B, and 29 to Richard R. Nageotte, filed. jd (E-176)
5/29/85	ORDER granting motion E-176. Copy to counsel. (BMM:jd)
8/9/85	MOTION (H-47) of A for stay of mandate, filed (DHB:nac)
8/9/85	PETITION FOR REHEARING (H-48) and Suggestion for Rehearing In Banc of A, filed (DHB:nac)
8/12/85	Transmitted A's pet. for reh. and sug. for reh. in banc to HLW; EMS; DDW (U.S.D.J.) (DHB:nac) With copy of pet. to all circuit judges

DATE	FILINGS—PROCEEDINGS
8/13/85	Letter denying A's motion for stay of mandate, filed (SAR:nac)
8/28/85	MOTION of E (H-176) for ext. of time in which to answer the pet. for rehearing, filed. jd.
8/28/85	ORDER granting motion H-176. E's answer to pet. for rehearing due 9/12/85. (SAR:jd) Copy to counsel and court and DDW.
08/09/85	Bill of costs, E, filed.
09/09/85	Bill of costs not taxed at this time; no statutory authority cited. Copies to Nageotte, Kalkstein, Matzen/McGuire. lgs
09-12-85	RESPONSE (H-48) to A's petition for rehearing and suggestion for rehearing in banc of E, filed (DHB:cw) Transmitted to HLW, EMS, DDW on 09-13-85.
10-30-85	ORDER denying H-48, filed (BHR:cw) Copy of order sent to Negeotte, Kane, Kalkstein, Donley and Matzen-McGuire.
11-04-85	REVISED ORDER denying H-48, filed (BHR:cw) copy of order sent to same counsel as 10-30-85 order.
11-05-85	MOTION (K-22) of A for stay of mandate pending writ of certiorari, filed. bhr Transmitted to HLW, EMS, DDW.
11/18/85	ORDER denying motion K-22, filed (BHR:jm) Copy to Nageotte; Kalkstein; Matzen-McGuire
11/22/85	REVISED ORDER denying motion K-22 filed (BHR:jm) Copy to Nageotte; Kalkstein; Matzen-McGuire
11/26/85	Bill of costs taxed. Copies to Nageotte, Kalkstein/Matzen/McGuire. lgs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action File No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

SUMMONS

To the above named Defendant:

You are hereby summoned and required to serve upon Justin W. Williams, United States Attorney, John F. Kane, Assistant United States Attorney, Eastern District of Virginia, P. O. Box 60, Norfolk, Virginia 23501; Diane L. Donley, Attorney, Environmental Defense Section, Land and Natural Resources Division, U.S. Department of Justice, 9th and Pennsylvania Avenue, N.W., Washington, D.C. 20530, plaintiff's attorneys, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

W. FARLEY POWERS, JR.
Clerk of court

/s/ Martha E. Graham
Deputy Clerk
[SEAL OF COURT]

Date: July 2, 1981

NOTE:—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

NOTICE TO PARTIES OF RIGHT TO CONSENT TO
JURISDICTION OF UNITED STATES MAGISTRATE

Pursuant to 28 U.S.C. Sec. 36(c)(2) the parties to this action are hereby notified of their right to consent to the conduct of any or all proceedings in this civil action, including the entry of dispositive orders, by a United States Magistrate specially designated by the Court to exercise such jurisdiction. Please indicate your decision concerning consent to such jurisdiction at the foot of this form. *Your decision should be communicated to the Clerk of this Court.* Be assured that neither a district judge nor a magistrate shall attempt to persuade or induce any party to consent to the reference of this matter to a magistrate.

You are further notified that if all parties consent to the exercise of jurisdiction in this case by a magistrate, appeal from the judgment of a magistrate will be to the United States Court of Appeals for the Fourth Circuit unless all the parties to this action further consent to appeal to a district judge. If appeal to a district judge is elected by all of the parties, only upon petition for leave to appeal by a party stating specific objections to the judgment. Election of this method of appeal shall not limit any party's right to seek review by the Supreme Court of the United States.

The form attached hereto, duly completed, should be returned to the Clerk by the plaintiff(s) within twenty (20) days from the date of receipt hereof and by defendant(s) with the filing of the answer or responsive motion.

W. FARLEY POWERS, JR.
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff(s),
vs.

EDWARD LUNN TULL,
Defendant(s).

**DECISION ON JURISDICTION
OF UNITED STATES MAGISTRATE**

The undersigned party hereby consents/declines to consent [delete inappropriate word(s)] to exercise of jurisdiction in this civil action by a duly designated U.S. Magistrate pursuant to 28 U.S.C. Sec. 636(c) (1), to the full extent provided in said statute.

[Make election in following paragraph only if you consented to jurisdiction]

The undersigned party further elects the method of appeal set forth below, should judgment in this action be made by a magistrate:

- _____ Appeal directly to the Fourth Circuit Court of Appeals (28 U.S.C. Sec. 636(c) (3))
- _____ Appeal to a district judge with further review by the Fourth Circuit Court of Appeals upon petition for leave to appeal (28 U.S.C. Sec. 636(c) (4) & (5))

Name of Party

By _____
Signature of party,
authorized officer or counsel
(Type or print name &
indicate capacity on line
below)

Date: _____

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant.

COMPLAINT

The United States of America, through its undersigned attorney and by authority of the Attorney General alleges that:

1. This is a civil action instituted pursuant to Section 309 of the Clean Water Act (hereinafter the Act), 33 U.S.C. 1319, to obtain injunctive relief and the imposition of civil penalties for defendant's failure to comply with Section 301(a) and 404 of the Clean Water Act, 33 U.S.C. 1311 and 33 U.S.C. 1344, respectively.

2. Authority to bring this suit is vested in the Department of Justice by 28 U.S.C. 516 and 519 and 33 U.S.C. 1366.

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C. 1319. Notice of commencement of this action has been given to the Commonwealth of Virginia.

4. Venue is proper pursuant to 28 U.S.C. 1391(b) and (c) and 33 U.S.C. 1319(b).

5. Defendant Edward Lunn Tull of South Main Street, Chincoteague, Virginia 23336, is and, at all times perti-

nent to this Complaint, has been a resident of and doing business in the Eastern District of Virginia.

CLAIM ONE

6. Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant into waters of the United States, except as in compliance with, *inter alia*, a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. 1344.

7. Section 309(d) of the Act, 33 U.S.C. 1319(d), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. 1311(a), shall be subject to civil penalty not to exceed \$10,000 per day of such violation.

8. Defendant owns and/or controls real property on Chincoteague Island, specifically a real property commonly known as Ocean Breezes Mobile Home Sites and Ocean Breezes Mobile Home Sites Section B, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively.

9. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut and Black Point Drain on the real property known as Ocean Breezes Mobile Home Sites and Ocean Breezes Mobile Home Sites Section B are waters of the United States.

10. Between September 28, 1977 and November 14, 1980 at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraphs Eight and Nine above.

11. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Ten.

12. The acts set forth in Paragraph Ten without the permit described in Paragraphs Six and Eleven constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311 (a), and entitle the United States to relief, pursuant to U.S.C. 1319.

CLAIM TWO

13. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

14. At all times pertinent to this claim, defendant owned and/or controlled real property on Chincoteague Island, specifically a property commonly known as Mire Pond Camper Sites, adjacent to Fowling Gut, a waterway connected to Chincoteague Channel.

15. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut known as Mire Pond Camper Sites are waters of the United States.

16. At specific times best known to the defendant, sometime between September 28, 1977 and November 14, 1980, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Fowling Gut described in Paragraphs Fourteen and Fifteen above.

17. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Sixteen.

18. The acts set forth in Paragraph Sixteen without the permit described in Paragraphs Six and Seventeen constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitled the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM THREE

19. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

20. Defendant owns and/or controls real property on Chincoteague Island, specifically property immediately north of Maddox Road and west of Eel Creek, a waterway connected to Little Oyster Bay and Assateague Channel.

21. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), these wetlands adjacent to Eel Creek described in Paragraph Twenty are waters of the United States.

22. As specific times best known to the defendant, but sometime between December 6, 1980 and December 11, 1980, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Eel Creek described in Paragraph Twenty above.

23. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Twenty-Two.

24. The acts set forth in Paragraph Twenty-two without the permit described in paragraphs Six and Twenty-Three above are violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

WHEREFORE plaintiff, United States of America, prays that:

1. Defendant be enjoined from further violations of Section 301(a), 33 U.S.C. 1311(a).

2. Defendant be directed to take and complete all measures to restore the wetland areas affected by the unlawful activities set forth in Claims One, Two, and

Three above to their condition prior to the discharge of fill material by defendant;

3. Defendant be assessed civil penalties in the amount of \$10,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. 1311(a), set forth in Claims One, Two, and Three above;

4. Plaintiff be awarded the costs and disbursements of this action; and

5. Plaintiff be granted such other relief as the Court may deem just and proper.

Respectfully submitted,

JUSTIN W. WILLIAMS
United States Attorney

/s/ John F. Kane
JOHN F. KANE
Assistant United States
Attorney
Eastern District of Virginia
P.O. Box. 60
Norfolk, Virginia 24501

/s/ Diane L. Donley
DIANE L. DONLEY
Attorney
Environmental Defense
Section
Land and Natural Resources
Division
U.S. Department of Justice
9th and Pennsylvania Avenue,
N.W.
Washington, D.C. 20530

Of Counsel
Benjamin Kalstein
Attorney, United States
Environmental Protection Agency
Region III
Philadelphia, PA 19106

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff
vs.

EDWARD LUNN TULL,
Defendant

ANSWER AND GROUNDS OF DEFENSE

ANSWER

COMES NOW your Defendant, Edward Lunn Tull, by counsel who without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America respectfully answers the Complaint heretofore exhibited against him as follows:

1. The allegations contained in paragraph 1 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

2. The allegations contained in paragraph 2 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

3. The allegations contained in paragraph 3 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal con-

clusions require answer, they are denied. The allegation that notice of commencement of this action has been given to the Commonwealth of Virginia is unknown and therefore denied.

4. The allegations contained in paragraph 4 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

5. The allegations contained in paragraph 5 of the Complaint are admitted.

CLAIM ONE

6. The allegations contained in paragraph 6 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

7. The allegations contained in paragraph 7 of the Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

8. The allegations contained in paragraph 8 of the Complaint are denied.

9. The allegations contained in paragraph 9 of the Complaint are denied.

10. The allegations contained in paragraph 10 of the Complaint are denied.

11. The allegations contained in paragraph 11 of the Complaint to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit are conclusions of law and incapable of admission or denial but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit

was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

12. The allegations contained in paragraph 12 of the Complaint are denied.

CLAIM TWO

13. The answers provided by Defendant in paragraph 6 and 7 of the Complaint are hereby realleged and incorporated by reference herein as if fully set forth herein.

14. The allegations contained in paragraph 14 of the Complaint are denied.

15. The allegations contained in paragraph 15 of the Complaint are denied.

16. The allegations contained in paragraph 16 of the Complaint are denied.

17. The allegations contained in paragraph 17 of the Complaint to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit are conclusions of law and incapable of admission or denial but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

18. The allegations contained in paragraph 18 of the Complaint are denied.

CLAIM THREE

19. The answers provided by Defendant in paragraphs 6 and 7 of the Complaint are hereby realleged and incorporated by reference herein as if fully set forth herein.

20. The allegations contained in paragraph 20 of the Complaint are admitted.

21. The allegations contained in paragraph 21 of the Complaint are denied.

22. The allegations contained in paragraph 22 of the Complaint are denied.

23. The allegations contained in paragraph 23 of the Complaint to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit are conclusions of law and incapable of admission or denial but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

24. The allegations contained in paragraph 24 of the Complaint are denied.

—GROUNDS OF DEFENSE

COMES NOW your Defendant, Edward Lunn Tull, by counsel and without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America, sets out his grounds of defense to the Complaint heretofore exhibited against him and respectfully alleges as follows:

1. Your Defendant denies that subject matter jurisdiction over this case rests with the United States District Court upon the grounds that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

2. Your Defendant alleges that the Complaint heretofore exhibited against him does not state a claim upon which relief can be granted by reason that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

3. Your Defendant asserts as a defense and would specifically allege and affirmatively assert that the statutes and regulations upon which the Plaintiff, United States of America, relies as set out in this Complaint are unconstitutional as to your Defendant upon the following grounds:

(a) The statutes and/or regulations upon which the Plaintiff, United States of America seek to rely in this case are unlawful and unconstitutional as they seek to extend jurisdiction of the Plaintiff, United States of America, without constitutional and/or legal authority granted to the United States of America by the Constitution of the United States of America or any provision thereof.

(b) Alternatively if the statutes and/or regulations relied upon by Plaintiff are found to be a constitutional exercise of jurisdiction by the United States of America, that the statutes and/or regulations relied upon by the Plaintiff, United States of America, in this case and as to your Defendant are unlawful and unconstitutional upon the following grounds:

- (1) The statutes and/or regulations are vague and indefinite as they do not establish a definite and certain boundary of jurisdiction by which the Defendant and those similarly situated to the Defendant know or could reasonably ascertain whether or not jurisdiction applies, a permit is required and/or the activity prescribed is prohibited.
- (2) The statutes and/or regulations as enforced deny to your Defendant and others similarly situated equal protection of the law and due process of law as is required by the Constitution of the United States of America.
- (3) The statutes and/or regulations as enforced against your Defendant and others similarly situated are a sham and subterfuge the purpose of which is to violate the Constitution of the United States and take the property of Defendant and/or those similarly situated without just compensation under the guise of a permit process. Under the statutes and/or regulations it is

the established policy of the Secretary of the Army through its consulting agencies, the Department of the Interior and the Environmental Protection Agency to deny all permit requests the purpose of which is to fill wetlands.

- (4) The statutes and/or regulations upon which your Plaintiff relies are unconstitutional as to your Defendant and those similarly situated as the same are administered not for the purpose of insuring the quality of the waters of the United States as prescribed by the statute but are, in fact, used and administered in actual practice to prevent the use of property owned by citizens of the United States and constitute the taking of property by the United States without just compensation in violation of the Constitution of the United States of America.
- (5) The statutes and/or regulations relied upon by Plaintiff are unconstitutional as applied to your Defendant and others similarly situated as the penalty set out therein, i.e., a fine in the amount of \$10,000.00 per day for each day of violation constitutes a criminal penalty disguised as a civil penalty and the same constitutes cruel and unusual punishment within the contemplation of the Constitution of the United States of America.

4. Your Defendant specifically alleges and affirmatively pleads the defenses of res adjudicata and/or collateral estoppel. In support thereof your Defendant alleges that the issues raised and sought to be litigated by your Plaintiff, United States of America, were previously the subject of a civil action in this court styled, United States of America vs. Edward Lunn Tull. The entire record of said prior civil action is incorporated herein by reference and made a part hereof as if the same were fully set out.

5. Your Defendant specifically alleges and affirmatively pleads the defenses of laches and estoppel. In support thereof your Defendant alleges that the real property which is the subject of this Complaint was previously reviewed by the authorized agents of the Plaintiff, United States of America, and the activities proposed by your Defendant with respect to said properties were fully and completely disclosed to the authorized agents of the Plaintiff, United States of America. That after full disclosure and with full and complete consultation with the agents of your Plaintiff, United States of America, the said agents advised and directed your Defendant as to what activities your Defendant was and was not permitted to perform. That if your Defendant conducted any acts as alleged in the Complaint heretofore exhibited against him such acts were in full compliance with the advice and consultation with the authorized agents of your Plaintiff, United States of America. That during any activity conducted by your Defendant the activities of your Defendant were fully and carefully monitored by the aforesaid agents of your Plaintiff, United States of America, and your Defendant was never advised that the activities were not in conformance with the specific authorization granted to him by the aforesaid agents of your Plaintiff, United States of America. Your Defendant further alleges that said activities would not have been conducted by him but for the specific authorization of the authorized agents of the Plaintiff, United States of America. Your Defendant therefore asserts and affirmatively alleges that your Plaintiff, United States of America, is bound by the doctrine of estoppel and laches to maintain this suit against your Defendant.

6. Your Defendant would specifically allege and affirmatively plead the equitable defense of unclean hands and in support of said defense respectfully alleges as follows:

- (a) That any activity of your Defendant which is the subject of the Complaint filed by your Plaintiff, United States of America, was explicitly

and/or inferentially authorized and approved by the authorized agents of your Plaintiff, United States of America.

- (b) That your Defendant has been heretofore prosecuted both criminally and civilly in the United States District Court for the Eastern District of Virginia, Norfolk Division for alleged violations of the Rivers and Harbors Act of 1899 and under the statutes upon which Plaintiff relies in this Complaint.
- (c) That in all prior prosecutions, both criminal and civil, your Defendant ultimately prevailed.
- (d) That from the date when your Defendant prevailed in the aforesaid criminal and civil actions brought against him by your Plaintiff, United States of America, your Defendant has continually and consistently been the subject of harassment by agents of your Plaintiff, United States of America.
- (e) That this harassment has become so severe in the past as to require your Defendant to prosecute criminally certain agents of your Plaintiff, United States of America, for trespass and other violations of the rights of your Defendant.
- (f) That your Defendant is upon information and belief that because he successfully prevailed in prior criminal and civil prosecutions brought against him by Plaintiff and because he found it necessary to prosecute agents of the United States of America to protect his rights that a conspiracy was formed by a combination of certain agents of your Plaintiff, United States of America. The purpose of this conspiracy is to inflict punishment upon your Defendant by continued bureaucratic harassment and the filing of vexatious law suits the purpose of which is to subject your Defendant to severe emotional

stress, the expenditure of substantial financial resources to defend himself and to cause your Defendant to lose time from his normal and lawful employment.

- (g) That your Defendant is upon information and belief that the Complaint heretofore exhibited against him is a continuation of the aforesaid conspiracy and harassment sought to be inflicted upon him by agents of the Plaintiff, United States of America.
- (h) That as a result of the willful, wanton, wrongful and malicious conspiracy against your Defendant by certain agents of the Plaintiff, United States of America, that the doctrine of unclean hands should be invoked, the Complaint dismissed and attorneys' fees awarded to your Defendant.

7. Your Defendant specifically reserves the right to plead other and/or further additional defenses as may from time to time become appropriate as a result of further pleadings and/or discovery in this case.

WHEREFORE, your Defendant having hereinabove set out his Grounds Of Defense to the Complaint hereinabove exhibited against him respectfully prays that the Complaint be dismissed together with his costs including his reasonable attorneys' fees in defense thereof.

EDWARD LUNN TULL

/s/ Edward Lunn Tull
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant.

FIRST AMENDED COMPLAINT

The United States of America, through its undersigned attorneys and by authority of the Attorney General, alleges that:

1. This is a civil action instituted pursuant to Section 309 of the Clean Water Act (hereinafter the Act), 33 U.S.C. 1319, to obtain injunctive relief and the imposition of civil penalties for defendant's failure to comply with Section 301(a) of the Clean Water Act, 33 U.S.C. 1311.

2. Authority to bring this suit is vested in the Department of Justice by 28 U.S.C. 516 and 519 and 33 U.S.C. 1366.

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C. 1319. Notice of commencement of this action has been given to the Commonwealth of Virginia.

4. Venue is proper pursuant to 28 U.S.C. 1391(b) and (c) and 33 U.S.C. 1319(b).

5. Defendant Edward Lunn Tull of South Main Street, Chincoteague, Virginia 23336, is and, at all times perti-

nent to this Complaint, has been a resident of and doing business in the Eastern District of Virginia.

CLAIM ONE

6. Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant into waters of the United States, except as in compliance with, *inter alia*, a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. 1344.

7. Section 309(d) of the Act, 33 U.S.C. 1319(d), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. 1311(a), shall be subject to civil penalty not to exceed \$10,000 per day of such violation.

8. Defendant owns and/or controls real property on Chincoteague Island, specifically a real property commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively.

9. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut and Black Point Drain on the real property known as Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B, and Ocean Breeze Mobile Home Sites Section C are waters of the United States.

10. Commencing on or about September 28, 1977 and continuing to the present time, at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraph Eight and Nine above. Plaintiff further alleges that unless enjoined by this Court defendant will continue to discharge pollutants onto the wetlands described in Paragraph 8 above.

11. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Ten.

12. The acts set forth in Paragraph Ten without the permit described in Paragraphs Six and Eleven constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to U.S.C. 1319.

CLAIM TWO

13. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

14. At all times pertinent to this claim, defendant owned and/or controlled real property on Chincoteague Island, specifically a property commonly known as Mire Pond Camper Sites, adjacent to Fowling Gut, a waterway connected to Chincoteague Channel.

15. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut known as Mire Pond Camper Sites are waters of the United States.

16. At specific times best known to the defendant, sometime between September 28, 1977 and November 14, 1980, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Gowling Gut described in Paragraphs Fourteen and Fifteen above.

17. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Sixteen.

18. The acts set forth in Paragraph Sixteen without the permit described in Paragraphs Six and Seventeen constitute violations of Section 301(a) of the Act, 33

U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM THREE

19. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

20. Defendant owns and/or controls real property on Chincoteague Island, specifically property immediately north of Maddox Road and west of Eel Creek, a waterway connected to Little Oyster Bay and Assateague Channel.

21. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), these wetlands adjacent to Eel Creek described in Paragraph Twenty are waters of the United States.

22. At specific times best known to the defendant, but sometime commencing December 6, 1980 and continuing to the present time, defendant discharged or caused to be discharged pollutants, consisting of said, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Eel Creek described in Paragraph Twenty above. Plaintiff further alleges that unless enjoined by this Court, defendant will continue to discharge pollutants onto the wetlands described in Paragraph 21 above.

23. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Twenty-Two.

24. The acts set forth in Paragraph Twenty-two without the permit described in paragraphs Six and Twenty-Three above are violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM FOUR

25. Paragraph Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

26. On plaintiff's information and belief, defendant owns and/or controls additional wetlands, in the vicinity of the properties described in Paragraphs 8, 15, and 21 above, onto which defendant has discharged and/or caused to be discharged, or may in the future discharge and/or cause to be discharged pollutants, consisting of sand, dirt and other fill material onto such wetlands in violation of Section 301 of the Clean Water Act, 33 U.S.C. 1311. The location of these wetlands is well known to defendant.

WHEREFORE plaintiff, United States of America, prays that:

1. Defendant be enjoined from any and all further violations of Section 301(a), 33 U.S.C. 1311(a).
2. Defendant be directed to take and complete all measures to restore the wetland areas affected by the unlawful activities set forth in Claims One, Two, Three, and Four above to their condition prior to the discharge of fill material by defendant;
3. Defendant be assessed civil penalties in the amount of \$10,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. 1311(a), set forth in Claims One, Two, Three, and Four above;
4. Plaintiff be awarded the costs and disbursements of this action; and
5. Plaintiff be granted such other relief as the Court may deem just and proper.

Respectfully submitted,

ELSIE MUNSELL
United States Attorney

JOHN F. KANE
Assistant United States Attorney
Eastern District of Virginia
P.O. Box 60
Norfolk, Virginia 23501

DIANE L. DONLEY
Attorney, Environmental Defense
Section
Land and Natural Resources
Division
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Of Counsel
Benjamin Kalkstein
Attorney, United States
Environmental Protection Agency
Region III
Philadelphia, PA 19106

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant

ANSWER AND GROUNDS OF DEFENSE

ANSWER

COMES NOW your Defendant, Edward Lunn Tull, by Counsel, who without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America, respectfully answers the First Amended Complaint of Plaintiff, United States of America, heretofore exhibited against him as follows:

1. The allegations contained in Paragraph 1 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

2. The allegations contained in Paragraph 2 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

3. The allegations contained in Paragraph 3 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that

said legal conclusions require answer, they are denied. The allegation that notice of commencement of this suit has been given to the Commonwealth of Virginia is unknown and therefore denied.

4. The allegations contained in Paragraph 4 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

5. The allegations contained in Paragraph 5 of the First Amended Complaint are admitted.

CLAIM ONE

6. The allegations contained in Paragraph 6 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

7. The allegations contained in Paragraph 7 of the First Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

8. The allegations contained in Paragraph 8 of the First Amended Complaint are denied.

9. The allegations contained in Paragraph 9 of the First Amended Complaint are denied.

10. The allegations contained in Paragraph 10 of the First Amended Complaint are denied.

11. The allegations contained in Paragraph 11 of the First Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

12. The allegations contained in Paragraph 12 of the First Amended Complaint are denied.

CLAIM TWO

13. The answers provided by Defendant in Paragraph 6 and 7 of the First Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 13.

14. The allegations contained in Paragraph 14 of the First Amended Complaint are denied.

15. The allegations contained in Paragraph 15 of the First Amended Complaint are denied.

16. The allegations contained in Paragraph 16 of the First Amended Complaint are denied.

17. The allegations contained in Paragraph 17 of the First Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

18. The allegations contained in Paragraph 19 of the First Amended Complaint are denied.

CLAIM THREE

19. The answers provided by Defendant in Paragraphs 6 and 7 of the First Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 19.

20. The allegations contained in Paragraph 20 of the First Amended Complaint are admitted.

21. The allegations contained in Paragraph 21 of the First Amended Complaint are denied.

22. The allegations contained in Paragraph 22 of the First Amended Complaint are denied.

23. The allegations contained in Paragraph 23 of the First Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

24. The allegations contained in Paragraph 24 of the First Amended Complaint are denied.

CLAIM FOUR

25. The answers provided by Defendant in Paragraphs 6 and 7 of the First Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 25.

26. Your Defendant admits that he owns and/or controls additional land in the vicinity of the properties described in Paragraphs 8, 15, and 21 of the First Amended Complaint. Further, your Defendant admits that he intends to improve and/or develop said property owned and/or controlled by him to the full extent permitted by law. All other allegations contained in Paragraph 26 of the First Amended Complaint are denied. Your Defendant would further, specifically and affirmatively, allege that your Plaintiff seeks to deny to your Defendant the use and benefit of his property in violation of the Constitution of the United States of America.

WHEREFORE your Defendant, Edward Lunn Tull, having hereinabove set out his Answer to the First Amended Complaint heretofore exhibited against him, respectfully prays that the Complaint be dismissed together with his costs, including his reasonable attorney's fees in defense thereof.

GROUNDS OF DEFENSE

COMES NOW your Defendant, Edward Lunn Tull, by Counsel and without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America, sets out his Grounds of Defense to the First Amended Complaint heretofore exhibited against him and respectfully alleges as follows:

1. Your Defendant denies that subject matter jurisdiction over this case rests with the United States District Court upon the grounds that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

2. Your Defendant alleges that the First Amended Complaint heretofore exhibited against him does not state a claim upon which relief can be granted by reason that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

3. Your Defendant asserts as a defense and would specifically allege and affirmatively assert that the statutes and regulations upon which the Plaintiff, United States of America, relies as set out in this First Amended Complaint are unconstitutional as to your Defendant upon the following grounds:

(a) The statutes and/or regulations upon which the Plaintiff, United States of America seek to rely in this case are unlawful and unconstitutional as they seek to extend jurisdiction of the Plaintiff, United States of America, without constitutional and/or legal authority granted to the United States of America by the Constitution of the United States of America or any provision thereof.

(b) Alternatively, if the statutes and/or regulations relied upon by Plaintiff are found to be a constitutional exercise of jurisdiction by the United States of America,

that the statutes and/or regulations relied upon by the Plaintiff, United States of America, in this case and as to your Defendant are unlawful and unconstitutional upon the following grounds:

(1) The statutes and/or regulations are vague and indefinite as they do not establish a definite and certain boundary of jurisdiction by which the Defendant and those similarly situated to the Defendant know or could reasonably ascertain whether or not jurisdiction applies, a permit is required and/or the activity prescribed is prohibited.

(2) The statutes and/or regulations as enforced deny to your Defendant and others similarly situated equal protection of the law and due process of law as is required by the Constitution of the United States of America.

(3) The statutes and/or regulations as enforced against your Defendant and others similarly situated are a sham and subterfuge, the purpose of which is to violate the Constitution of the United States and take the property of Defendant and/or those similarly situated without just compensation under the guise of a permit process. Under the statutes and/or regulations it is established policy of the Secretary of the Army through its consulting agencies, the Department of the Interior and the Environmental Protection Agency to deny all permit requests, the purpose of which is to fill wetlands.

(4) The statutes and/or regulations upon which your Plaintiff relies are unconstitutional as to your Defendant and those similarly situated as the same are administered not for the purpose of insuring the quality of the waters of the United States as prescribed by the statute, but are, in fact, used and administered in actual practice to prevent the use of property owned by citizens of the United States and constitute the taking of property by the United States without just compensation in violation of the Constitution of the United States of America.

(5) The statutes and/or regulations relied upon by Plaintiff are unconstitutional as applied to your Defendant and others similarly situated as the penalty set out therein, i.e., a fine in the amount of \$10,000 per day for each day of violation constitutes a criminal penalty disguised as a civil penalty and the same constitutes cruel and unusual punishment within the contemplation of the Constitution of the United States of America.

4. Your Defendant specifically alleges and affirmatively pleads the defenses of res judicata and/or collateral estoppel. In support thereof, your Defendant alleges that the issues raised and sought to be litigated by your Plaintiff, United States of America, were previously the subject of a civil action in this court styled, United States of America vs. Edward Lunn Tull. The entire record of said prior civil action is incorporated herein by reference and made a part hereof as if the same were fully set out.

5. Your Defendant specifically alleges and affirmatively pleads the defenses of laches and estoppel. In support thereof, your Defendant alleges that the real property which is the subject of this First Amended Complaint was previously reviewed by the authorized agents of the Plaintiff, United States of America, and the activities proposed by your Defendant with respect to said properties were fully and completely disclosed to the authorized agents of the Plaintiff, United States of America. That after full disclosure and with full and complete consultation with the agents of your Plaintiff, United States of America, the said agents advised and directed your Defendant as to what activities your Defendant was and was not permitted to perform. That if your Defendant conducted any acts as alleged in the First Amended Complaint heretofore exhibited against him, such acts were in full compliance with the advice and consultation with the authorized agents of your Plaintiff, United States of America. That during any activity conducted by your

Defendant, the activities of your Defendant were fully and carefully monitored by the aforesaid agents of your Plaintiff, United States of America, and your Defendant was never advised that the activities were not in conformance with the specific authorization granted to him by the aforesaid agents of your Plaintiff, United States of America. Your Defendant further alleges that said activities would not have been conducted by him but for the specific authorization of the authorized agents of the Plaintiff, United States of America. Your Defendant therefore asserts and affirmatively alleges that your Plaintiff, United States of America, is bound by the doctrine of estoppel and laches to maintain this suit against your Defendant.

6. Your Defendant would specifically allege and affirmatively plead the equitable defense of unclean hands and in support of said defense respectfully alleges as follows:

(a) That any activity of your Defendant which is the subject of the Complaint filed by your Plaintiff, United States of America, was explicitly and/or inferentially authorized and approved by the authorized agents of your Plaintiff, United States of America.

(b) That your Defendant has been heretofore prosecuted both criminally and civilly in the United States District Court for the Eastern District of Virginia, Norfolk Division for alleged violation of the Rivers and Harbors Act of 1899 and under the statutes upon which Plaintiff relies in this First Amended Complaint.

(c) That in all prior prosecutions, both criminal and civil, your Defendant ultimately prevailed.

(d) That from the date when your Defendant prevailed in the aforesaid criminal and civil actions brought against him by your Plaintiff, United States of America, your Defendant has continually and consistently been the subject of harassment by agents of your Plaintiff, United States of America.

(e) That this harassment has become so severe in the past as to require your Defendant to prosecute criminally certain agents of your Plaintiff, United States of America, for trespass and other violations of the rights of your Defendant.

(f) That your Defendant is upon information and belief that because he successfully prevailed in prior criminal and civil prosecutions brought against him by Plaintiff and because he found it necessary to prosecute agents of the United States of America to protect his rights that a conspiracy was formed by a combination of certain agents of your Plaintiff, United States of America. The purpose of this conspiracy is to inflict punishment upon your Defendant by continued bureaucratic harassment and the filing of vexatious law suits, the purpose of which is to subject your Defendant to severe emotional stress, the expenditure of substantial financial resources to defend himself and to cause your Defendant to lose time from his normal and lawful employment.

(g) That your Defendant is upon information and belief that the First Amended Complaint heretofore exhibited against him is a continuation of the aforesaid conspiracy and harassment sought to be inflicted upon him by agents of the Plaintiff, United States of America.

(h) That as a result of the willful, wanton, wrongful and malicious conspiracy against your Defendant by certain agents of the Plaintiff, United States of America, that the doctrine of unclean hands should be invoked, the First Amended Complaint dismissed and attorneys' fees awarded to your Defendant.

7. Your Defendant intends to rely upon the defense of immunity from prosecution and in support thereof would specifically allege as follows:

(a) That on the 2nd day of April, 1982, this Court entered an order at the request of Plaintiffs, granting to Defendant immunity from prosecution.

(b) That the penalties sought by the Plaintiff herein are criminal and or quasi-criminal in nature, notwithstanding that Plaintiff seeks to assert that the said penalties are civil in nature.

(c) That by reason of the aforesaid immunity from prosecution your Defendant may not be prosecuted by Plaintiff and/or subject to the relief sought by Plaintiff in its First Amended Complaint.

8. Your Defendant specifically reserves the right to plead other and/or further additional defenses as may from time to time become appropriate as a result of further pleadings and/or discovery in this case.

Wherefore, your Defendant, having hereinabove set out his Grounds of Defense to the First Amended Complaint heretofore exhibits against him, respectfully prays that the First Amended Complaint be dismissed together with his costs including his reasonable attorneys' fees in defense thereof.

EDWARD LUNN TULL

By /s/ Edward Lunn Tull
Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE, ESQ.
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

C.A. No. 81-688-N

UNITED STATES OF AMERICA,
v.
EDWARD LUNN TULL,
Plaintiff,
Defendant.

SECOND AMENDED COMPLAINT

The United States of America, through its undersigned attorneys and by authority of the Attorney General, alleges that:

1. This is a civil action instituted pursuant to Section 309 of the Clean Water Act, 33 U.S.C. 1319, to obtain injunctive relief and the imposition of civil penalties for defendant's failure to comply with Section 301 (a) of the Clean Water Act, 33 U.S.C. 1311 and pursuant to Section 12 of the Rivers and Harbors Act, 33 U.S.C. 406, to obtain injunctive relief for defendant's failure to comply with Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403.

2. Authority to bring this suit is vested in the Department of Justice by 28 U.S.C. 516 and 519 and 33 U.S.C. 1366.

3. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1345 and 33 U.S.C. 1319, and 33 U.S.C. 406. Notice of commencement of this action has been given to the Commonwealth of Virginia.

4. Venue is proper pursuant to 28 U.S.C. 1391(b) and (c) and 33 U.S.C. 1319(b).

5. Defendant Edward Lunn Tull of South Main Street, Chincoteague, Virginia 23336, is and, at all times pertinent to this Complaint, has been a resident of and doing business in the Eastern District of Virginia.

CLAIM ONE

6. Section 301(a) of the Act, 33 U.S.C. 1311(a), prohibits the discharge of any pollutant into waters of the United States, except as in compliance with, *inter alia*, a permit issued by the Secretary of the Army pursuant to Section 404 of the Act, 33 U.S.C. 1344.

7. Section 309(d) of the Act, 33 U.S.C. 1319(d), provides that any person who violates Section 301(a) of the Act, 33 U.S.C. 1311(a), shall be subject to civil penalty not to exceed \$10,000 per day of such violation.

8. Defendant owns and/or controls real property on Chincoteague Island, specifically a real property commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively.

9. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut and Black Point Drain on the real property known as Ocean Breeze Mobile Home Sites and Ocean Breeze Mobile Home Sites Section B, and Ocean Breeze Mobile Home Sites Section C are waters of the United States.

10. Commencing on or after July 1975, and continuing to the present time, at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of said, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraphs Eight and Nine above. Plaintiff further alleges that unless enjoined by this Court defendant will con-

tinue to discharge pollutants onto the wetlands described in Paragraph 8 above.

11. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Ten.

12. The acts set forth in Paragraph Ten without the permit described in Paragraphs Six and Eleven constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to U.S.C. 1319.

CLAIM TWO

13. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

14. At all times pertinent to this claim, defendant owned and/or controlled real property on Chincoteague Island, specifically a property commonly known as Mire Pond Camper Sites, adjacent to Fowling Gut, a waterway connected to Chincoteague Channel.

15. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), the wetlands adjacent to Fowling Gut known as Mire Pond Camper Sites are waters of the United States.

16. At specific times best known to the defendant, sometime between September 28, 1977 and November 14, 1980, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Fowling Gut described in Paragraphs Fourteen and Fifteen above.

17. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Sixteen.

18. The acts set forth in Paragraph Sixteen without the permit described in Paragraphs Six and Seventeen constitute violations of Section 301(a) of the Act, 33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM THREE

19. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

20. Defendant owns and/or controls real property on Chincoteague Island, specifically property immediately north of Maddox Road and west of Eel Creek, a waterway connected to Little Oyster Bay and Assateague Channel.

21. Pursuant to Section 502(7) of the Act, 33 U.S.C. 1362(7), these wetlands adjacent to Eel Creek described in Paragraph Twenty are waters of the United States.

22. At specific times best known to the defendant, but sometimes commencing December 6, 1980 and continuing to the present time, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands adjacent to Eel Creek described in Paragraph Twenty above. Plaintiff further alleges that unless enjoined by this Court, defendant will continue to discharge pollutants onto the wetlands described in Paragraph 21 above.

23. The Secretary of the Army has not issued a permit for the discharge of fill material pursuant to Section 404 of the Act, 33 U.S.C. 1344, to defendant for the operations described in Paragraph Twenty-Two.

24. The acts set forth in Paragraph Twenty-two without the permit described in paragraphs Six and Twenty-Three above are violations of Section 301(a) of the Act,

33 U.S.C. 1311(a), and entitle the United States to relief, pursuant to 33 U.S.C. 1319.

CLAIM FOUR

25. Paragraphs Six and Seven of this Complaint are herein incorporated by reference as if fully set forth herein.

26. On plaintiffs's information and belief, defendant owns and/or controls additional wetlands, in the vicinity of the properties described in Paragraphs 8, 15, and 21 above, onto which defendant has discharged and/or caused to be discharged, or may in the future discharge and/or cause to be discharged pollutants, consisting of sand, dirt and other fill material onto such wetlands in violation of Section 301 of the Clean Water Act, 33 U.S.C. 1311. The location of these wetlands is well known to defendant.

CLAIM FIVE

27. Section 10 of the Rivers and Harbors Act of 1899 prohibits the creation of any obstruction to the navigable capacity of any waters of the United States except as authorized by the Secretary of the Army and recommended by the Chief of Engineers, 33 U.S.C. 403.

28. On plaintiffs' information and belief, defendant filled the navigable water of the United States on the real property commonly known as Ocean Breeze Mobile Home Sites without the authorization of the Secretary of the Army and the recommendation of the Chief of Engineers.

WHEREFORE plaintiff, United States of America, prays that:

1. Defendant be enjoined from any and all further violations of Section 301(a), 33 U.S.C. 1311(a).

2. Defendant be directed to take and complete all measures to restore the wetland areas affected by the unlawful activities set forth in Claims One, Two, Three,

and Four above to their condition prior to the discharge of fill material by defendant;

3. Defendant be assessed civil penalties in the amount of \$10,000 per day for each violation of Section 301(a) of the Act, 33 U.S.C. 1311(a), set forth in Claims One, Two, Three, and Four above;

4. This Court enter an injunction requiring defendant to remove the obstruction unlawfully created in the navigable waters of the United States as described in Claim Five.

5. Plaintiff be awarded the costs and disbursements of this action; and

6. Plaintiff be granted such other relief as the Court may deem just and proper.

Respectfully submitted,

ELSIE MUNSELL
United States Attorney

JOHN F. KANE
Assistant United States Attorney
Eastern District of Virginia
P.O. Box 60
Norfolk, Virginia

/s/ Diane L. Donley
DIANE L. DONLEY
Attorney, Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
9th and Pennsylvania Avenue, N.W.
Washington, D.C. 20530

Of Counsel
Benjamin Kalkstein
Attorney, United States
Environmental Protection Agency
Region III
Philadelphia, PA 19106

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
— NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

vs.

EDWARD LUNN TULL
Defendant

**ANSWER AND GROUNDS OF DEFENSE
TO SECOND AMENDED COMPLAINT**

COMES NOW your Defendant, Edward Lunn Tull, by counsel, who without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America, respectfully answers the Second Amended Complaint of Plaintiff, United States of America, heretofore exhibited against him as follows:

1. The allegations contained in Paragraph 1 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

2. The allegations contained in Paragraph 2 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

3. The allegations contained in Paragraph 3 of the Second Amended Complaint consist of legal conclusions,

not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied. The allegation that notice of commencement of this suit has been given to the Commonwealth of Virginia is unknown and therefore denied.

4. The allegations contained in Paragraph 4 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

5. The allegations contained in Paragraph 5 of the Second Amended Complaint are admitted.

CLAIM ONE

6. The allegations contained in Paragraph 6 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

7. The allegations contained in Paragraph 7 of the Second Amended Complaint consist of legal conclusions, not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

8. The allegations contained in Paragraph 8 of the Second Amended Complaint are denied.

9. The allegations contained in Paragraph 9 of the Second Amended Complaint are denied.

10. The allegations contained in Paragraph 10 of the Second Amended Complaint are denied.

11. The allegations contained in Paragraph 11 of the Second Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal con-

clusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

12. The allegations contained in Paragraph 12 of the Second Amendment Complaint are denied.

CLAIM TWO

13. The answers provided by Defendant in Paragraphs 6 and 7 of the Second Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 13.

14. The allegations contained in Paragraph 14 of the Second Amended Complaint are denied.

15. The allegations contained in Paragraph 15 of the Second Amended Complaint are denied.

16. The allegations contained in Paragraph 16 of the Second Amended Complaint are denied.

17. The allegations contained in Paragraph 17 of the Second Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

18. The allegations contained in Paragraph 18 of the Second Amended Complaint are denied.

CLAIM THREE

19. The answers provided by Defendant in Paragraphs 6 and 7 of the Second Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 19.

20. The allegations contained in Paragraph 20 of the Second Amended Complaint are admitted.

21. The allegations contained in Paragraph 21 of the Second Amended Complaint are denied.

22. The allegations contained in Paragraph 22 of the Second Amended Complaint are denied.

23. The allegations contained in Paragraph 23 of the Second Amended Complaint, to the extent that they infer a requirement by the Secretary of the Army for issuance of a permit, are conclusions of law and incapable of admission or denial, but to the extent that said legal conclusions require answer, are denied. Your Defendant admits that no permit was obtained from the Secretary of the Army. Your Defendant denies that a permit was or is required.

24. The allegations contained in Paragraph 24 of the Second Amended Complaint are denied.

CLAIM FOUR

25. The answers provided by Defendant in Paragraphs 6 and 7 of the Second Amended Complaint are hereby realleged and incorporated by reference herein as if fully set forth in answer to this Paragraph 25.

26. Your Defendant admits that he owns and/or controls land in the vicinity of the properties described in Paragraphs 8, 14, and 20 of the Second Amended Complaint. Further, your Defendant admits that he intends to improve and/or develop said property owned and/or controlled by him to the full extent permitted by law. All other allegations contained in Paragraph 26 of the Second Amended Complaint are denied. Your Defendant would further, specifically and affirmatively, allege that your Plaintiff seeks to deny to your Defendant the use and benefit of his property in violation of the Constitution of the United States of America and that your Plaintiff seeks to take the property of your Defendant without just compensation in violation of the Constitution of the United States of America.

CLAIM FIVE

27. The allegations contained in Paragraph 27 of the Second Amended Complaint consist of legal conclusions not appropriate for admission or denial and to the extent that said legal conclusions require answer, they are denied.

28. The allegations contained in Paragraph 28 of the Second Amended Complaint are denied.

WHEREFORE your Defendant, Edward Lunn Tull, having hereinabove set out his Answer to the Second Amended Complaint heretofore exhibited against him, respectfully prays that the Complaint be dismissed together with his costs, including his reasonable attorney's fees in defense thereof.

GROUND OF DEFENSE

COMES NOW your Defendant, Edward Lunn Tull, by counsel and without waiving the benefit and protections granted to him pursuant to the Fifth Amendment of the Constitution of the United States of America, sets out his Grounds of Defense to the Second Amended Complaint heretofore exhibited against him and respectfully alleges as follows:

1. Your Defendant denies that subject matter jurisdiction over this case rests with the United States District Court upon the grounds that the statutes and regulations upon which the Plaintiff, United States of America, relies are unconstitutional.

2. Your Defendant alleges that the Second Amended Complaint heretofore exhibited against him does not state a claim upon which relief can be granted by reason that the statutes and/or regulations upon which the Plaintiff, United States of America, relies are unconstitutional and/or unconstitutionally applied.

3. Your Defendant asserts as a defense and would specifically allege and affirmatively assert that the statutes and regulations upon which the Plaintiff, United

States of America, relies as set out in this Second Amended Complaint are unconstitutional and/or unconstitutionally applied as to your Defendant upon the following grounds:

(a) The statutes and/or regulations upon which the Plaintiff, United States of America, seeks to rely in this case are unlawful and unconstitutional as they seek to extend jurisdiction of the Plaintiff, United States of America, without constitutional and/or legal authority granted to the United States of America by the Constitution of the United States of America or any provision thereof.

(b) Alternatively, if the statutes and/or regulations relied upon by Plaintiff are found to be a constitutional exercise of jurisdiction by the United States of America, that the statutes and/or regulations relied upon by the Plaintiff, United States of America, in this case and as to your Defendant are unlawful and unconstitutional upon the following grounds:

(1) The statutes and/or regulations are vague and indefinite as they do not establish a definite and certain boundary of jurisdiction by which the Defendant and those similarly situated to the Defendant know or could reasonably ascertain whether or not jurisdiction applies, a permit is required and/or the activity prescribed is prohibited.

(2) The statutes and/or regulations as enforced by the Plaintiff and its agents deny to Defendant and others similarly situated equal protection of the law and due process of law as is required by the Constitution of the United States of America.

(3) The statutes and/or regulations as enforced by the Plaintiff and its agents against your Defendant and others similarly situated

are a sham and subterfuge, the purpose of which is to violate the Constitution of the United States and take the property of Defendant and/or those similarly situated without just compensation under the guise of a permit process. Under the statutes and/or regulations it is the established policy of the Secretary of the Army through the Division and District Engineers, its consulting agencies, the Department of the Interior and the Environmental Protection Agency to deny all Section 404 permit requests, the purpose of which is to fill wetlands.

(4) The statutes and/or regulations upon which your Plaintiff relies are unconstitutional as to your Defendant and those similarly situated as the same are administered not for the purpose of insuring the quality of the waters of the United States as prescribed by the statute but are, in fact, used and administered by the Plaintiff and its agents in actual practice to prevent the use of property owned by citizens of the United States and constitute the taking of property by the United States without just compensation in violation of the Constitution of the United States of America.

(5) The statutes and/or regulations relied upon by Plaintiff are unconstitutional as applied to your Defendant and others similarly situated as the penalty set out therein, i.e., a fine in the amount of \$10,000 per day for each day of violation constitutes a criminal penalty disguised as a civil penalty and the same constitutes cruel and unusual punishment within the contemplation of the Constitution of the United States of America.

(6) The statutes and/or regulations relied upon by Plaintiff are unconstitutional as applied

to your Defendant and other similarly situated upon the grounds that the statute impermissibly delegates from the legislative body of the government to the administrative body of the government its legislative function and/or that the regulations adopted by the administrative body of the government are in fact legislative enactments exceeding the delegation of authority permitted by the Constitution from the legislative to the administrative branch of government. If the statute is not an impermissible delegation of the legislative function to the administrative branch of the government, the regulations adopted pursuant to the statute exceed the permissible grant of authority by the legislature and constitute legislation in violation of this principle of law.

4. Your Defendant specifically alleges and affirmatively pleads the defenses of res adjudicata and/or collateral estoppel. In support thereof, your Defendant alleges that the issues raised and sought to be litigated by your Plaintiff, United States of America, were previously the subject of a civil action in this court styled, United States of America vs. Edward Lunn Tull. The entire record of said prior civil action is incorporated herein by reference and made a part hereof as if the same were fully set out.

5. Your Defendant specifically alleges and affirmatively pleads the defenses of laches and estoppel. In support thereof, your Defendant alleges that the real property which is the subject of this Second Amended Complaint was previously reviewed by the authorized agents of the Plaintiff, United States of America, and the activities proposed by your Defendant with respect to said properties were fully and completely disclosed to the authorized agents of the Plaintiff, United States of America. That after full disclosure and with full and

complete consultation with the agents of your Plaintiff, United States of America, the said agents advised and directed your Defendant as to what activities your Defendant was and was not permitted to perform. That if your Defendant conducted any acts as alleged in the Second Amended Complaint heretofore exhibited against him, such acts were in full compliance with the advice and consultation with the authorized agents of your Plaintiff, United States of America. That during any activity conducted by your Defendant, the activities of your Defendant were fully and carefully monitored by the aforesaid agents of your Plaintiff, United States of America, and your Defendant was never advised that the activities were not in conformance with the specific authorization granted to him by the aforesaid agents of your Plaintiff, United States of America, and/or that any of the activities constituted and/or was alleged to constitute a violation of any statute and/or regulation notwithstanding the affirmative duty imposed by regulation on the agents of Plaintiff to advise the Defendant. Your Defendant further alleges that said activities would not have been conducted by him but for the specific and/or implied authorization of the authorized agents of the Plaintiff, United States of America. Your Defendant therefore asserts and affirmatively alleges that your Plaintiff, United States of America, is bound by the doctrine of estoppel, laches and/or fair play to maintain this suit against your Defendant and/or obtain the relief requested.

6. Your Defendant would specifically allege and affirmatively plead the equitable defense of unclean hands and in support of said defense respectfully alleges as follows:

(a) That any activity of your Defendant which is the subject of the Complaint filed by your Plaintiff, United States of America, was explicitly and/or inferentially authorized and approved by the authorized agents of your Plaintiff, United States of America.

(b) That your Defendant has been heretofore prosecuted both criminally and civilly in the United States District Court for the Eastern District of Virginia, Norfolk Division for alleged violation of the statutes upon which Plaintiff relies in this Second Amended Complaint.

(c) That in all prior prosecutions, both criminal and civil, your Defendant ultimately prevailed.

(d) That from the date when your Defendant prevailed in the aforesaid criminal and civil actions brought against him by your Plaintiff, United States of America, your Defendant has continually and consistently been the subject of harassment by agents of your Plaintiff, United States of America.

(e) That this harassment has become so severe in the past as to require your Defendant to prosecute criminally certain agents of your Plaintiff, United States of America, for trespass and other violations of the rights of your Defendant.

(f) That your Defendant is upon information and belief that because he successfully prevailed in prior criminal and civil prosecutions brought against him by Plaintiff and because he found it necessary to prosecute agents of the United States of America to protect his rights that a conspiracy was formed by a combination of certain agents of your Plaintiff, United States of America. The purpose of this conspiracy is to inflict punishment upon your Defendant by continued bureaucratic harassment and the filing of vexatious law suits, the purpose of which is to subject your Defendant to severe emotional stress, the expenditure of substantial financial resources to defend himself and to cause your Defendant to lose time from his normal and lawful employment.

(g) That your Defendant is upon information and belief that the Second Amended Complaint heretofore exhibited against him is a continuation of the afore-

said conspiracy and harassment sought to be inflicted upon him by agents of the Plaintiff, United States of America.

(h) That as a result of the willful, wanton, wrongful and malicious conspiracy against your Defendant by certain agents of the Plaintiff, United States of America, that the doctrine of unclean hands should be invoked, the Second Amended Complaint dismissed and attorneys' fees awarded to your Defendant.

7. Your defendant intends to rely upon the defenses of immunity from prosecution and in support thereof would specifically allege as follows:

(a) That on the 2nd day of April, 1982, this Court entered an Order at the request of Plaintiffs, granting to Defendant immunity from prosecution.

(b) That the penalties sought by the Plaintiff herein are criminal and/or quasi-criminal in nature, notwithstanding that Plaintiff seeks to assert that the said penalties are civil in nature.

(c) That by reason of the aforesaid immunity from prosecution your Defendant may not be prosecuted by Plaintiff and/or subject to the relief sought by Plaintiff in its Second Amended Complaint.

8. Your Defendant specifically reserves the right to plead other and/or further additional defenses as may from time to time become appropriate as a result of further pleadings and/or discovery and/or at trial in this case.

WHEREFORE, your Defendant, having hereinabove set out his Grounds of Defense to the Second Amended Complaint heretofore exhibited against him, respectfully prays that the Second Amended Complaint be dismissed

together with his costs in including his reasonable attorneys' fees in defense thereof.

EDWARD LUNN TULL

By /s/ Edward Lunn Tull
Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

[Certificate of Service Omitted in Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

vs.

EDWARD LUNN TULL,
Defendant

[Filed Aug. 11, 1981]

DEMAND FOR JURY TRIAL

COMES NOW your Defendant, Edward Lunn Tull, by counsel, and pursuant to Federal Rules of Civil Procedure, Rule 38(b), demands trial by jury of all issues relied upon by Plaintiff in support of paragraph 2, 3 and 4 of Plaintiff's prayer for relief as contained in the Complaint heretofore filed.

Your Defendant would state as the grounds for his demand for trial by jury that the relief sought by paragraphs 2, 3 and 4 of the Complaint result in a money judgment are punitive and quasi-criminal in nature. That as a result thereof, your Defendant is entitled by the Constitution of the United States and case law binding the United States District Courts to trial by jury, all as is more fully set out in the Memorandum in Support of Demand for Jury Trial, which memorandum is attached hereto, incorporated herein and made a part of this Motion.

WHEREFORE, your Defendant prays that his Demand for a jury trial be granted and that all issues relating to prayers 2, 3 and 4 of the Complaint be tried by jury.

EDWARD LUNN TULL

/s/ Edward Lunn Tull
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Sept. 10, 1981]

ORDER

This matter comes on upon defendant's motions (1) for a more definite statement, and (2) for a jury trial.

(1) We believe that the complaint alleges in sufficient detail that the defendant has discharged pollutants into waters of the United States by placing fill upon certain land near Chincoteague, Virginia, without having first secured a permit from the Secretary of the Army. The complaint is neither vague or ambiguous to the point that the defendant cannot reasonably be expected to recognize the charges and to answer. *Hodson v. Virginia Baptist Hospital, Inc.*, 482 F.2d 821 (4th Cir. 1973).

The motion for a more definite statement is DENIED.

(2) On the defendant's request for a jury trial, we find that the relief sought by the United States is, in

every instance, equitable in nature, or directives sought from the Court to-wit:

- i. An injunction is sought against future violations.
- ii. Restoration of the wetlands to their former, unspoiled, condition.
- iii. Civil penalties to be assessed by the under 33 U.S.C. § 1311(a).
- iiii. Costs of the action.
- iiiii. Other relief as the Court may find necessary.

Clearly, the penalty under 33 U.S.C. § 1311(a) is a civil assessment and not a Sixth Amendment criminal sanction. *United States v. Ward*, 448 U.S. 242 (1980). Restoration of the premises, if applicable, is for Court direction. Costs and "other relief" are matters for the Court to assess.

The demand for jury trial is DENIED.

It is so ORDERED.

/s/ John MacKenzie
United States District Judge

Norfolk, Virginia

September 9, 1981.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81688N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Nov. 4, 1983]

PETITION

COMES NOW your Defendant, Edward Lunn Tull, by Counsel, and without waiving the issues contained in the Motion for a New Trial and/or the Defendant's right of appeal as to those issues, and petitions this Court for the relief hereinafter specified and in support thereof submits a Memorandum of Law in support of the relief prayed for in this Petition upon the following grounds:

1. This Court entered its written Opinion together with a Judgment Order on the 28th day of September, 1983.

2. The Judgment Order of this Court entered on the 28th day of September, 1983 in Paragraph (C) granted to the Defendant an election to pay, in the alternative, a fine in the sum of \$250,000.00 or by election duly filed in writing in the Clerk's Office of this Court within ten (10) days from the date of the Order obtain a suspen-

sion of said fine on the condition that the Defendant, agree to restore, what the Court found to be, an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975.

3. By Order of this Court entered on October 6, 1983 the time granted to the Defendant to make the election contained in the Order of this Court entered on September 28, 1983 was extended to thirty (30) days from the date of the Order of October 6, 1983.

4. The Order of this Court entered on September 28, 1983 clearly intended to offer to the Defendant, an election but by reason of the unique factual situation of this case did not offer the Defendant an election for the following reasons:

a. The Order of September 28, 1983 clearly intended by implication that the defendant was to restore what the Court referred to as the extension of Fowling Gut to its former navigable condition as it existed between 1963 and November, 1975. This requirement infers that the restoration be along the exact same route that existed prior to filling.

b. The un rebutted evidence presented during trial of this case was that this filled area has been subdivided into mobile home lots which have been sold to third parties and there has been a valid recordation of a subdivision plat which binds the Defendant, to convey the streets which traverse across the filled area to the Commonwealth of Virginia for inclusion of the State's Secondary Roads System. Utilities have also been placed in this area to serve the mobile home lots sold to third parties.

c. This Court should take judicial notice of the fact that the Defendant, is a private citizen and as such does not have the power of condemnation and eminent domain.

4. For the reasons hereinabove set out and as your Defendant, does not have the power of condemnation and eminent domain it is impossible for him to guarantee to this Court within the time limits prescribed and/or within any time limit that he can reacquire all property purchased by third party purchasers and roads which he is obligated by law to dedicate to the Virginia State Secondary Roads System in order to take advantage of the election provided by the Court in Paragraph (C) of the Judgment Order entered on the 28th day of September, 1983.

5. Your Defendant believes that this Court genuinely desired to offer to your Defendant a true election and not an election that would be impossible to perform by the Defendant. Defendant therefore believes that the fact that this Court offered an impossible election results from the Court's inadvertent failure to consider that the property which would be necessary to be dug up in order to restore what the Court found to be Fowling Gut extended in its exact location prior to filling was property conveyed to third parties and obligations incurred by the Defendant to Accomack County and the Commonwealth of Virginia prior to institution of this suit. These conveyances which were entered into long before this suit was filed cannot be set aside and your Defendant cannot legally force a reconveyance to him of these properties.

6. Believing that this Court intended to grant to your Defendant a genuine election rather than a sham election which would be impossible to perform your Defendant if given additional time and the opportunity to do so can present to this Court an engineering plan to restore a similar area in a more Westerly direction over property owned by the Defendant, or which can be acquired by the Defendant, connecting the area to Fowling Gut at a more Southerly location. Such a plan would constitute a true election as it would be possible of performance by your Defendant and would accomplish the goal expressed by this Court in its Opinion and Order.

7. The relief sought by this Petition will not substantially alter or affect the Plaintiff's recovery in this case. Reopening of a water way connection as proposed by your Defendant would result in an area being dredged of the exact same dimensions which would connect to the same water way, i.e. Fowling Gut. The only variance from its original location would be that it would be moved approximately one hundred yards to the west and intersect Fowling Gut several hundred yards to the south.

WHEREFORE your Defendant, Edward Lunn Tunn, respectfully petitions this Court to grant the following relief:

A. That this Court enter an Order finding that the election offered by this Court in Paragraph (C) of its Order entered on September 28, 1983 is realistically impossible for your Defendant to perform.

B. Permit your Defendant within a reasonable time from the entry of the above Order to present engineering drawings to construct a connection between Fowling Gut and the southern terminus of the filled area which would offer the same interconnection at a different location.

EDWARD LUNN TULL

/s/ Edward Lunn Tull
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,
v.

EDWARD LUNN TULL,
Defendant.

[Filed Jan. 5, 1984]

ORDER

This matter arises on the defendant's Petition for Relief from the final judgment entered by this Court on September 28, 1983. For the reasons set forth below, the defendant's petition is DENIED.

In this action involving the landfill of wetland property without the requisite permit, the defendant was directed to elect either to restore the extension of Fowling Gut to its prior condition or pay a fine in the amount of \$250,000.00. By order of this Court dated October 6, 1983, the defendant was given an additional thirty (30) days to elect from the date of the order. On November 4, 1983, the day required for the defendant to make his election, the defendant filed the instant petition for relief.

The defendant alleges in the instant petition that restoration of the waterway is not possible unless this Court grants a variance as to the precise location of the rein-

stituted waterway. Specifically, the defendant requested that the original location be moved approximately one hundred yards to the west and intersect Fowling Gut several hundred yards to the south. The defendant requested that this Court enter an order finding that the election referred to above is realistically impossible and allowing the defendant to submit engineering plans that would permit the same interconnection at a different location. Subsequently, an oral hearing was held on December 16, 1983, approximately two and one-half months after entry of judgment and six weeks after the petition for relief were filed.

The defendant requested on November 22, 1983, that all of the many voluminous exhibits introduced at trial be readied for the oral argument indicating to the Court that the defendant would present some factual development. Alas, such was not the case. The defendant presented absolutely no evidence to substantiate the feasibility of his request nor any evidence to show that the Court's original order was impractical. He did not offer any engineering study or any biological evidence relating to the environmental impact of the proposed variance. No testimony was presented specifying the percentage of property currently owned by the defendant nor was testimony elicited as to the practicality of obtaining the necessary property from the present owners.

Rather, the defendant requested yet another additional thirty (30) day period in which to obtain an engineering report. This request was made even though the defendant had well over thirty days from the date the petition was filed to obtain such a report. The only justification offered for the defendant's failure to prepare the report prior to the oral argument was that he did not want to expend funds unnecessarily.

It is patently obvious to this Court that the present petition was inserted merely to gain further delay in an action already replete with multiple examples of pro-

tracted litigation. Accordingly, the Court, after hearing all the arguments, finds no basis to grant the petition nor to permit additional time to obtain further information. The Court, during a recess, even attempted unsuccessfully to contact the defendant's engineer to ascertain if the defendant's proposal had any credence.

Finding no reason to alter the Court's prior judgment, the Court hereby DENIES defendant's petition for relief. Further, the Court once again allows the defendant thirty (30) days from the date hereof in which to elect whether to restore the waterway or pay the fine.

IT IS SO ORDERED.

/s/ Robert G. Doumar
United States District Judge

At Norfolk, Virginia
January 5th, 1984

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Jan. 12, 1984]

MOTION FOR REHEARING

COMES NOW your Defendant Edward Lunn Tull, by Counsel, and in accordance with Rule 59(a) moves this Court for a Rehearing of Defendant's Petition for Relief from the Final Judgment entered by this Court on September 28, 1983, which Petition was denied by this Court by Order entered on January 5, 1984 upon the following grounds:

1. This Court entered its written Opinion together with the Judgment Order on the 28th day of September, 1983.

2. The Judgment Order of this Court entered on the 28th day of September, 1983 in paragraph (C) ordered the Defendant to pay, a fine in the sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00) or by election duly filed in writing in the Clerk's Office of this Court within Ten (10) days from the date of the Order obtain

a suspension of the fine on the condition that the Defendant, agree to restore what the Court found to be, an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975.

3. By order of this Court entered on October 6, 1983 the time granted to the Defendant to make the election contained in the Order of this Court entered on September 28, 1983 was extended to Thirty (30) days from the date of the Order of October 6, 1983.

4. On November 4, 1983 the Defendant filed a Petition praying that this Court find that the election offered in paragraph (C) of its Order entered on September 28, 1983 is realistically impossible for the Defendant to perform and to permit the Defendant within Thirty (30) days to present engineering drawings to construct a connection between Fowling Gut and the southern terminus of the fill area which would offer the same interconnection at a different location.

5. An Oral Hearing was held by this Court on December 16, 1983 and an Order was entered by this Court on January 5, 1984 denying Defendant's prayer for relief for the reasons stated in the Order. At this hearing Defendant's Counsel showed the Court on the trial exhibits the approximate location of the proposed alternative route and advised the Court that the proposed waterbody would have exactly the same cross-section upon completion as the existing waterbody.

6. Subsequent to the Hearing held by this Court on December 16, 1983, Defendant's Counsel reported to Defendant the position of the Court at which time Defendant authorized Defendant's Counsel to proceed to obtain the necessary engineering drawings notwithstanding the substantial expense involved and the possibility that this Court would not further entertain Defendant's Petition.

7. Immediately after the intervening holiday season on January 6, 1984, Defendant's Counsel met with De-

fendant and Defendant's engineer, Ronald Beebe, at the property on Chincoteague, Virginia for the purpose of clearing areas of underbrush in order that the exact location of the proposed alternative could be staked upon the ground and drafted into detailed engineering drawings.

8. Upon returning to his office in Woodbridge, Virginia on Saturday, January 7, 1984, Defendant's attorney found in the mail the Order of this Court entered on January 5, 1984. On Sunday, January 8, 1984 Counsel telephoned both Defendant and Defendant's Engineer requesting that the plan be expedited in order that it could be filed with this Court.

9. As will be seen from the enclosed Affidavits, Defendant's Petition was not filed for the purpose of delay but was filed in good faith with the express intention of following through and providing a genuine election to the Defendant the original election being impossible of performance.

10. No delay or prejudice to the litigants will result as jurisdiction continues to rest in this Court pending ruling on Defendant's Motion for a New Trial, which Motion cannot be determined until such time as the trial transcript is completed. The official Court Reporter has advised this Court that the transcript should be completed by March or April.

11. Defendant has demonstrated his good faith by expending substantial funds to obtain the engineering necessary to propose this relocation to the Court notwithstanding this Court's prior ruling.

12. As will be seen by the Affidavits attached to this Motion, restoration of what the Court found to be an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975 is impossible and far more expensive than the payment of a fine in the sum of Two Hundred and Fifty Thousand

Dollars (\$250,000.00). It does not represent a genuine election to the Defendant. Restoration through the proposed alternative route does present a viable election to the Defendant and would provide the relief sought by the Plaintiff, United States of America. Accordingly refusal by the Court to consider the alternative restoration suggested by the Defendant would thwart the alleged purpose of the Plaintiff which was to seek restoration in favor of a punitive fine in the grossly excessive sum of Two Hundred and Fifty Thousand Dollars (\$250,000.00).

13. Justice, fairness and equity support the granting of the relief prayed for herein.

WHEREFORE your Defendant prays that this Court grant his Motion for a New Hearing in accordance with Rule 59(a). Further that the Court upon consideration of the Affidavits and Counter Affidavits, if any, grant the relief requested and Amend The Judgment of September 28, 1983 to permit the Defendant to elect to restore what the Court found to be an extension of Fowling Gut to the location as shown on the engineering drawings submitted with this Motion. Defendant desires to state the reasons for granting this Motion orally, however, in view of this Court's belief that Defendant seeks to delay these proceedings, Defendant waives oral argument and consents to a determination on the Motion and attached Affidavits.

EDWARD L. TULL

/s/ Edward L. Tull
By Counsel

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelnick
14908 Jefferson Davis Highway
Woodbridge, VA 22191
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL
Defendant

[Filed Jan. 12, 1984]

AFFIDAVIT OF RICHARD R. NAGEOTTE,
ATTORNEY AT LAW

COMES NOW Richard R. Nageotte, Attorney at Law, Counsel for Defendant, Edward Lunn Tull, and after being first duly sworn states as follows:

1. That subsequent to the Opinion and Judgment Order of this Court entered on the 28th day of September, 1983 a great deal of time and effort was expended filing the Motion for New Trial and obtaining the necessary Bond. During these consultations with my client I determined that my client could not within Thirty (30) days make an election to restore what the Court found to be an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975 and post a performance bond in the sum of Three Hundred Thousand Dollars (\$300,000.00) to ensure this restoration. My client could not guaranty that he could obtain all of the lots previously sold to third parties nor

could he ensure that he would be successful in obtaining approval from Accomack County and the Virginia Department of Highways and Transportation which would be required to modify a subdivision already approved and recorded and the road network located therein. Additionally, I determined that even if my client could ultimately obtain all of the property necessary and the approval of the governmental agencies that the cost to my client would substantially exceed the fine of \$250,000.00 imposed by this Court.

2. During these consultations with my client, it was determined that my client had subsequent to the trial of this case purchased additional property south of and adjacent to the Ocean Breeze Subdivision. This property was designated as uplands by the United States during trial and would probably be acceptable both from an environmental and engineering position to be used as an alternative route for restoration. Restoration along this alternative route would be economically reasonable.

3. The suggestion to petition the Court for Relief and request that the Court permit an additional Thirty (30) days to make the necessary detailed engineering studies was my decision concurred in by my client, and was for the sole purpose of avoiding unnecessary expenditure of funds in the event that it was the position of the Court that no restoration other than along the exact same route would be acceptable. At the time I made this decision it did not occur to me that the Court would consider what I thought to be a reasonable approach to this problem as a tactic for delay.

4. At no time did I take this action for purposes of delay, nor did I even consider that the Court would perceive the filing of this Petition as a tactic for delay. It was, and is still my position, that no delay results because until such time as this Court rules on Defendant's Motion for a New Trial this case remains within the jurisdiction of the Trial Court and no delay will

result. It is further my position that when the Court considers the Trial Transcript together with the Motion for a New Trial, the Court will determine that numerous errors exist in the Opinion and Findings of the Court which will substantially effect the Judgment entered in this case.

5. Immediately upon filing the Petition on November 4, 1983, I contacted Mrs. Michael Gunn, the Docketing Clerk of this Court, and attempted to have the Petition set for oral argument. Because of this Court's busy Trial Calendar the earliest date that could be obtained with the Agreement of all Counsel was November 22, 1983 and the hearing on the Petition was scheduled on that date. Subsequently I was advised by Mrs. Michael Gunn, the Docketing Clerk of this Court, that the case could not be heard on November 22nd because of this Court's conflicting schedule. At this time the hearing was continued to December 8, 1983. Because of a conflict either with the Court's schedule or other counsel, the case was again continued until December 16th, 1983 at which time the Oral Hearing was held. At the Hearing on December 16, 1983 I correctly represented to the Court the approximate location of the proposed restoration but advised the Court that I could not place the location exactly without the engineer's service. However, I did advise the Court that the physical dimensions proposed in the restoration would be exactly the same as those found in the existing waterbody and that only its location would be altered.

6. Upon hearing the Court's position at the Hearing on December 16, 1983, I advised my client and my client authorized me to proceed to obtain the necessary engineering services. Immediately after the holiday season I arranged to meet with my client and his engineer, Mr. Ronald Beebe, on the property on January 6, 1984, at which time the preliminary plan was laid out on the ground, survey lines were cleared and the feasibility study was conducted. When I left at 8:00 o'clock P.M.

on January 6th, 1983 to return to Northern Virginia, the engineer, Mr. Beebe, was to complete the engineering work, stake and flag the proposed location in order that it could be viewed by representatives of the Plaintiff, United States of America, and prepare final engineering drawings including location and cross-sections.

7. Upon return to my office on January 7th, 1984, I found in the mail this Court's Order of January 5, 1984. I immediately telephoned both my client and Mr. Beebe on Sunday, January 8th, 1984 and requested that this work be expedited.

8. Neither the original Petition or this Motion for Rehearing was or is done for any purpose other than to offer a viable election to my client and obtain the restoration sought by Plaintiff, United States of America. Justice, fairness and equity merit the consideration of the relief requested.

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE

STATE OF VIRGINIA

COUNTY OF PRINCE WILLIAM, to-wit:

Subscribed and sworn to before me this 9th day of January, 1984 by RICHARD R. NAGEOTTE.

/s/ Phyllis E. Danner
Notary Public

My Commission expires: 7-11-86

/s/ Richard R. Nageotte
RICHARD R. NAGEOTTE
Nageotte, Borinsky & Zelninck
14908 Jefferson Davis Highway
Woodbridge, Virginia 22191
Counsel for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Jan. 12, 1984]

AFFIDAVIT OF EDWARD LUNN TULL

COMES NOW EDWARD LUNN TULL, who. after being first duly sworn states as follows:

1. My name is Edward Lunn Tull and I am the Defendant in this case.

2. Subsequent to the Opinion and Judgment Order of this Court entered on the 28th day of September, 1983 I consulted with my attorney. During these consultations with my attorney I determined that I could not within Thirty (30) days make an election to restore what the Court found to be an extension of Fowling Gut to its former navigable condition as it existed between 1963 and November 1, 1975 and post a performance bond in the sum of Three Hundred Thousand Dollars (\$300,000.00) to ensure this restoration. I could not guaranty that I could obtain all of the lots previously sold to third parties nor could I ensure that I would be successful in obtain-

ing approval from Accomack County and the Virginia Department of Highways and Transportation which would be required to modify a subdivision already approved and recorded and the road network located therein. Additionally, I determined that even if I could ultimately obtain all the property necessary and the approval of the governmental agencies that the cost to me would substantially exceed the fine of \$250,000.00 imposed by this Court.

3. Subsequent to the trial of this case I purchased additional property south of and adjacent to the Ocean Breeze Subdivision which property was designated as uplands by the United States during trial. Restoration along this alternative route would be economically reasonable.

4. At no time did I take this action or request that my attorney take this action for purposes of delay.

7. As the Developer of Ocean Breeze Subdivision I am thoroughly familiar with land values and recent sales of lots both with and without trailers located in Ocean Breeze Subdivision.

6. On January 6, 1984 I accompanied my attorney through the Ocean Breeze Subdivision and placed the following listed evaluation on lots and, when applicable, trailers located upon these lots. It is my opinion that these values as of January 6, 1984 are as follows:

Lot	Land Purchase Cost	Trailer Purchase Cost	Total
69*	12,000	Vacant	12,000
68*	12,000	Vacant	12,000
67	12,000	35,000	47,000
66	12,000	20,000	32,000
65	12,000	Trailer owned by people that rent lot (by month)	12,000
64	12,000	Vacant	12,000
63	.00	Vacant	.00 (1)
62	15,000	Vacant	15,000
61	12,000	Vacant	12,000

Lot	Land Purchase Cost	Trailer Purchase Cost	Total
60	12,000	Vacant	12,000
59	12,000	Vacant	12,000 (2)
58*	12,000	40,000	52,000
57*	12,500	Vacant	12,500
51*	12,000	13,000	25,000
50)	all lots owned by one person probably could not be purchased at any price		118,000
49)			
48)			
47)			
	58,000.00		
46	13,000	Trailer owned by people who rent lot (by year)	13,000
45	12,000	20,000	32,000
44	12,000	Vacant	12,000
43*	12,000	Vacant	12,000
42*	12,000	Vacant	12,000
34*	14,000	18,000	32,000
33*	14,000	15,000	29,000
32	15,000	Trailer owned by people that rent	15,000
31	14,000	14,000	28,000 (3)
30	16,000	22,000	38,000
29*	16,000	12,000	28,000
28*	13,000	Vacant	13,000
	392,500	307,000	699,500

* Lots directly in original canal location

\$153,500 \$136,000 289,500

Notes: (1) This lot not usable alone.
(2) Sold two years ago at this price.
(3) This lot and trailer sold one year ago for \$28,000.00.

Of the above listed lots at the time of trial I testified that I owned only one lot, which is Lot 63, which I still own but have agreed to convey. Since the date of trial I acquired Lot 62, which I have agreed to convey. Except for Lots 62 and 63 I own no interest in any of the above numbered lots at this time or at the time of trial of this case and would be required to purchase these lots from third party owners in order to elect to make restoration as set out in this Court's Order entered September 28, 1983. I have no power of condemnation or eminent domain and cannot at this time state whether or not I

would be successful in re-acquiring all of these lots. However, if it would be necessary to acquire lots 47 through 50 I am virtually certain that these lots could not be purchased at any price. There may well be other lots which would not be for sale. The prices which I have set out in the above list are priced based upon an open market with a willing buyer and willing seller and these prices could substantially increase if lot owners became aware that I was absolutely required to purchase these lots.

7. If it were possible to purchase only those lots in the direct course of what the Court found to be an extension of Fowling Gut as it existed between 1963 and November 1, 1975, the lots in the above list set out in paragraph 6 which have an asterisk would be necessary. As the Court can see, the cost to obtain the land is \$153,000, the improvement \$136,000 for a total of \$289,500.00. I must assume that I would be required to purchase the trailers located upon the lots as most of the sales which have occurred require the purchase of not only the lot but the trailer located on the lot. In addition to the expenditure of \$289,500.00 in land and improvements acquisition costs, two drainfield lots would be eliminated at a cost of \$60,000.00 and two additional drainfield lots would have to be provided at a cost of \$60,000.00 for an additional expense of \$120,000.00. Purchasing only those lots in the direct path of the restoration would leave the remaining lots on the above list contained in paragraph 6 above without road and/or utility access to those lots. My engineer, Mr. Beebe has advised me that to provide a bridge across a waterbody Forty feet wide to provide access at each street would cost from \$75,000.00 to \$100,000.00 for each street. There are three state roads and one non-state service road which would have to be crossed in order to provide access to the remaining lots. My engineer has advised me that I cannot be assured of county or state approval of a plan to restore along the original course of the waterbody as the

subdivision has been approved and recorded many years prior to this and such a change would require a substantial amendment to the plans. Purchasing only those lots in the direct right of way and providing the necessary access to the additional lots would cost a total of approximately \$809,500. Purchasing all lots effected would cost a total of \$709,500.00. Not only would either of these plans be substantially more expensive than the \$250,000.00 fine imposed by the Court, but I could not possibly make an election within Thirty (30) days as I could not guarantee acquisition of the property or approval by the necessary governmental agencies.

8. Subsequent to the trial of this case, I acquired additional lands to the south of and adjacent to this subdivision which the government concedes are uplands. I have requested that my engineer, Mr. Beebe, prepare a plan to propose restoration of what the Court found to be an extension of Fowling Gut in an alternative location through an area conceded by the government to be uplands. My engineer, Mr. Beebe, has prepared such a plan and it is attached to his Affidavit. This plan would provide a true election to which I could perform at substantially less cost than the fine imposed.

9. I was advised by my attorney that the Court has taken the position that I have proposed this alternative restoration plan for the purpose of gaining delay in this case. Neither I nor my attorney have ever discussed the proposal of this plan as a means of delay and I do not seek to delay this case by proposing this alternative restoration plan. My sole purpose in proposing this alternative restoration plan is to obtain a true election and alternative to the payment of a fine in the sum of \$250,000.00.

/s/ Edward Lunn Tull
EDWARD LUNN TULL

STATE OF VIRGINIA AT LARGE

COUNTY OF ACCOMACK, to wit:

Subscribed and sworn to before me this 11 day of
January 1983 by EDWARD LUNN TULL.

/s/ Melvin E. Shepherd
Notary Public

My Commission expires: May 12 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff

v.

EDWARD LUNN TULL,
Defendant

[Filed Jan. 12, 1984]

AFFIDAVIT OF RONALD BEEBE

COMES NOW Ronald Beebe, who after being first
duly sworn states as follows:

1. My name is Ronald Beebe. I am the engineer for
Edward Lunn Tull, the Defendant in this case.

2. Subsequent to September 28, 1983 and prior to
November 4, 1983 I was consulted by Richard R. Nage-
otte, Attorney for Edward Lunn Tull and Edward Lunn
Tull concerning the feasibility of restoring what the Court
found to be an extension of Fowling Gut as it existed
between 1963 and November 1, 1975 to an alternate loca-
tion in the general area as I have precisely located it in
the attached engineering drawings. During these consul-
tations I advised both Mr. Tull and his attorney that
in my opinion it would be very difficult, if not impossible,
to make this restoration over its location as it existed
prior to filling because of the necessity to cut through

three subdivision streets together with the utilities located therein and provide alternative access. Ocean Breeze Subdivision is a subdivision approved by Accomack County and the Virginia Department of Highways and Transportation which is recorded in the land records of Accomack County, Virginia. Any change to the original subdivision plan would require the approval of these governmental agencies. If it were possible to obtain the lots from third party purchasers to make restoration through the original course, it would be necessary to provide road and utility service to those lots cut off. Three roads which have been built to Virginia Department of Highway and Transportation secondary road standards and one service road would have to be bridged and utilities would have to be provided. It is my opinion that each bridge crossing could cost from \$75,000.00 to \$100,000.00 each. It is possible that some type of box culvert design might be acceptable at somewhat less cost, however, the crossing of any waterbody forty feet wide with a state approved system would be very expensive. At least two drainfields costing approximately \$30,000.00 each would have to be eliminated as one drainfield lies directly in the route and the other would, upon completion of restoration, be within fifty feet of the water body thereby making it unacceptable under state standards. I advised both Mr. Tull and his attorney that in my opinion restoration over the alternative route which I have proposed on the attached drawings would be feasible.

3. Subsequent to December 16, 1983, I was again contacted by Mr. Tull and Mr. Nageotte and requested to do preliminary drawings and field work necessary to prepare an alternative restoration plan to connect what remains of the existing water body to Fowling Gut directly through an area which the United States has designated as an upland area without destroying any wetlands. On January 6, 1984 I met with Mr. Tull and Mr. Nageotte and after reviewing with them my preliminary plans we went

to the property and did the necessary preliminary field work. My survey crews cut vegetation to survey and stake an acceptable alternative location and I was directed by Mr. Nageotte to stake and flag this location for inspection by representatives of the United States. I was further directed to prepare detailed engineering drawings showing the exact alternative location together with cross sections of the existing waterbody and the proposed connecting waterbody. I have completed these detailed engineering drawings and they are attached to this Affidavit. The exact location has been staked and flagged and is available for inspection by representatives of the United States. It is my opinion as a professional engineer that the proposed alternative location will function the same as what the Court found to be an extension of Fowling Gut as it existed between 1963 and November 1, 1975 and will be of the exact same dimension notwithstanding that it will have two curves which did not exist in the original waterbody. It is my opinion as a professional engineer that this relocation can be constructed by the Defendant Mr. Tull at substantially less cost than \$250,000.00. The dredge material will not be placed on any wetlands but will be placed on uplands and, in my opinion, no wetlands should be effected by this proposal.

/s/ Ronald L. Beebe
RONALD L. BEEBE
Professional Engineer

STATE OF VIRGINIA AT LARGE

COUNTY OF ACCOMACK, to-wit:

Subscribed and sworn to before me this 11 day of January, 1984 by RONALD L. BEEBE, Professional Engineer.

/s/ Melvin E. Shepherd
Notary Public

My Commission expires: May 12, 1987

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 81-688-N

UNITED STATES OF AMERICA,
Plaintiff,

v.

EDWARD LUNN TULL,
Defendant.

[Filed Feb. 16, 1984]

ORDER

This matter arises on the defendant's motion to alter or amend the judgment of this Court entered on January 5, 1984, and on the defendant's motion for a rehearing of this Court's previous denial of Tull's petition for relief. *See* Rule 59 Fed.R.Civ.P. For the reasons stated below, both motions are DENIED.

Originally, judgment was entered in the above-styled action on September 28, 1983 directing the defendant to elect either to restore the extension of Fowling Gut to its prior condition or pay a fine in the amount of \$250,000.00. By order of this Court dated October 6, 1983, the defendant was given an additional thirty (30) days to elect from the date of the order. On November 4, 1983, the day required for the defendant to make his election, the defendant filed a petition for relief. After hearing oral argument, the Court denied the petition for relief from January 5, 1984.

Now, the defendant seeks a rehearing on this denial of his petition for relief, pursuant to Rule 59(a) of the Federal Rules of Civil Procedure. Rule 59(a) applies to requests for a new trial, and as the defendant previously filed on October 7, 1983 a motion for a new trial, this present motion for a rehearing will be treated as a motion for reconsideration of the denial of the defendant's petition for relief, rather than as a second motion for a new trial.

A motion for reconsideration, although not permitted by the Federal Rules of Civil Procedure, is common in federal practice. A motion for reconsideration is proper where the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. *Above the Belt, Inc. v. Mel Bohannon Roofing, Inc.*, No. 83-0202-R (E.D. Va. September 1, 1983) (unpl. op.). A further basis for a motion to reconsider a prior decision would be a controlling or significant change in the law or facts since the submission of the issue to the Court. *Id.* The granting of a motion for reconsideration is rarely warranted, and, here, the defendant has presented no basis for this Court to alter its previous decision.

Essentially the defendant argues that he has no true election because the cost of restoring Fowling Gut to its original condition theoretically would exceed the \$250,000 fine imposed. In support of this contention, an engineering study completed by Ronald Beebe sketching an alternative method to restore the water channel at less cost than \$250,000 was filed. Further, Tull submitted an affidavit detailing the possible costs involved in obtaining the necessary property currently owned by various third parties if the restoration was completed as the Court directed. Tull stated, "Purchasing all lots effected would cost a total of \$709,500. Not only would either of these plans be substantially more expensive than the \$250,000 fine imposed by this Court, but I could not possibly make

an election within thirty (30) days as I could not guarantee acquisition of the property or approval by the necessary governmental agencies." Lastly, an affidavit by Tull's attorney, Richard R. Nageotte, was submitted basically reiterating his client's position.

Nothing contained in this supplemental information inclines this Court to alter its previous ruling. The Court never guarantees that any election to restore would be less expensive than the fine imposed. Nor is the Court persuaded by the affidavits presented that the cost of restoration as directed would be prohibitively expensive. Additionally, Tull contends he could not make a proper election in thirty (30) days. The defendant appears recalcitrant in taking any action to further such an election. The initial court order directing an election was entered on September 28, 1983, a period of well over four months. Certainly, Tull has had a sufficient opportunity to investigate his alternatives by this time.

In conclusion, the Court finds that it understood Tull's contentions and based the decision denying the defendant's petition for relief on the basis of the adversarial issues presented to the Court at that time. Although the defendant at this late date offers some documentation of his alternative proposal, he has demonstrated no significant change in the law or facts arising since January 5, 1984, that would sway this Court. Accordingly, the defendant's motion for a rehearing is DENIED.

The Court will allow the defendant fifteen (15) days from the date hereof in which to elect whether to restore the waterway or pay the fine. Further, the Court admonishes the defendant that absolutely no additional extensions of time in which to make such an election will be awarded. The Court will not reconsider this decision absent extreme extenuating circumstances.

Next, the Court will discuss the defendant's motion to alter or amend the judgment entered on January 5, 1984, stating, "it is ordered and adjudged that defendant's petition for relief from the final judgment entered by

this Court on September 28, 1983 is DENIED." The instant motion was filed on January 11, 1983, well within ten (10) days of the January 5 entry of judgment. As such, the motion was filed in a timely fashion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.

In accordance with the language of Rule 54(b), a trial court's judgment on less than all the claims presented is not final and appealable where the Court does not make an express determination that there is no just reason for delay nor an express direction for entry of judgment. In this case, a pending motion for a new trial filed on October 7, 1983 cannot be decided until a transcript is completed. Therefore, at least one issue remains to be resolved. As the Court has issued no determination or directive as referred to in Rule 54(b), the entry of judgment in question which admittedly adjudicates fewer than all the claims presented does not terminate the defendant's right to a decision on his motion for a new trial or permit any immediate appeal. The order is deemed subject to revision at any time before the entry of judgment adjudicating *all* claims, and as such, is not a final appealable order. The time for appeal in the instant action will run from the date of decision of the last pending motion filed, in this case that would be the date of this Court's decision on the motion for a new trial. Accordingly, the Court hereby DENIES the defendant's motion to alter or amend the judgment of January 5, 1984.

In conclusion, the Court DENIES both the motion for a rehearing and the motion to alter or amend a judgment. Only a motion for a new trial is pending at this time.

IT IS SO ORDERED.

/s/ Robert G. Doumar

United States District Judge

At Norfolk, Virginia

February 16th, 1984

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

September 22, 1982 through September 28, 1982

* * * *

[1461] It goes to the remedy?

MISS DONLEY: Yes; it goes to the remedy.

THE COURT: All right.

MISS DONLEY: Normally this kind of case would be—

THE COURT: Just so I can ask you a question—

MISS DONLEY: Yes, sir.

THE COURT: Certainly Mr. Tull can't remedy what he's already sold.

What's the power of this Court to order somebody else who is not a party to this suit?

I can't take their property and dig a canal through their trailer park.

MISS DONLEY: We will be offering a restoration plan, too, but it's important to consider the loss to the ecology of the wetlands that have been filled in evaluating what the remedy should be, and it's what's been done in all the other cases that I am aware of—is to—

THE COURT: Well, I just want you to know I'm not about to cut out somebody's land that has been sold by Mr. Tull,—

MISS DONLEY: Very well, Your Honor.

THE COURT: —so you will understand that.

MISS DONLEY: Very well, Your Honor.

THE COURT: There is no way I can do it [1462] constitutionally, but—

The only thing you can cut open is what—

You show Mr. Tull—

If he's filled in wetlands contrary to the law, and you show this, we can make him unfill his own land; but we can't make him unfill somebody else's land.

MISS DONLEY: The United States in the restoration plan that they are going to present to this Court will not require—

THE COURT: That's assuming you win that you are going to present it to the Court.

MISS DONLEY: We—

The way this case is set up we must present it at this trial,—

THE COURT: All right.

MISS DONLEY: —unless Your Honor orders otherwise, because this is not a bifurcated trial.

THE COURT: All right. You go ahead, Miss Donley.

I just wanted to make sure I knew where we were going.

* * * *

[1737] MR. NAGEOTTE: And the ditch is not part of the case, Your Honor. I don't know why—

THE COURT: As far as I'm concerned, it's a very integral part of the case.

You may not consider it a part of the case. I consider it a part of the case.

Now, I thought we were talking about all of Ocean Breeze.

MR. NAGEOTTE: No, Your Honor. No, Your Honor.

THE COURT: We're not?

MR. NAGEOTTE: No.

THE COURT: Why not?

[1738] MISS DONLEY: We—

THE COURT: You keep calling it a ditch.

MR. NAGEOTTE: No, Your Honor. What we're talking about in this case are the wetlands.

THE COURT: We're talking about the wetlands; the navigable waters of the United States.

MR. NAGEOTTE: Your Honor, now—

No; we're not, Your Honor. We're talking about the crosshatched areas on—

THE COURT: We better be talking about the navigable waters of the United States, because if we're not I don't have any jurisdiction.

MR. NAGEOTTE: Your Honor, the ditch isn't part of the case.

The crosshatched areas—

THE COURT: It is a big part of the case, as far as I'm concerned, and I'm going to tell you that, and I'm not fooling anybody.

I'm considering all facets of this case.

I don't know if you called it a ditch. I found it's 40 feet wide, six feet deep.

What is that?

You know, I went down the Inland Waterway, and at spots it isn't 40 feet wide and six feet deep.

I got problems.

[1739] Is it not a part of this case, Miss Donley?

MISS DONLEY: It is a part of this case, Your Honor.

THE COURT: All right.

MR. NAGEOTTE: Now, wait a minute. Wait a minute.

If it is a part of this case, then I'm entitled to know what part of this case it is, Your Honor, because I was advised in pretrial that the part of this case was the filled wetlands which are carried in the crosshatched areas.

THE COURT: Well, I don't know. Maybe they consider the river,—

MR. NAGEOTTE: Well—

THE COURT: —whatever it might be, that it's not a—

Well, I'm not going to get into that.

You're saying that you feel you are taken by surprise about the ditch?

MR. NAGEOTTE: Well—

THE COURT: You didn't know the ditch was there?

MR. NAGEOTTE: Well, I'm not sure what she means when she says it's a part of the case.

If it's a part of the case because it may—

THE COURT: All right.

Well, Mr. Hume, perhaps you better step outside

[1740] before we contaminate you with all of this argument.

We'll just contaminate ourselves, Mr. Hume.

(At this point in the proceedings the witness retired from the courtroom.)

All right. Now, let's go, Mr. Nageotte. What's your objection?

MR. NAGEOTTE: Well, my objection, Your Honor, is that I have been led to believe throughout this case that the case concerns the crosshatched areas which are purportedly filled wetlands. It doesn't—

There is no complaint being made here concerning this ditch, and if what she's saying is the ditch—

THE COURT: Well, maybe she well is.

What is the situation with regard to the ditch, Miss Donley?

MISS DONLEY: We have filed a complaint for violations of 33 USC 1311, which is the discharge of any pollutant into navigable waters of the United States.

We've also included in Claim 4 any adjacent navigable waters.

We—

THE COURT: What is the statute of limitations on this?

MISS DONLEY: There is no—

The cases, the decided cases, indicate there is [1741] not a statute of limitations, because this is a continuing violation. It comes into the category of a continuing violation.

MR. NAGEOTTE: Well, now, to that, Your Honor, I want to tell Your Honor that I am shocked. I'm distressed. I'm surprised.

We took discovery in this case, and I asked them what the violations were. We went all through this, and that was never once said to be a violation.

The violations were specified to be the crosshatched areas, and I can't come in here and try a case and find out that somebody is alleging a new violation because

Your Honor hapened to pick up on it someplace along the way in the evidence, and I think that's what's happening, and I am prejudiced, Your Honor. My client is prejudiced.

And Miss Donley is misrepresenting to this Court what the facts of the discovery and what this case started out to be, what it went through discovery to be, and what it came into this court to be tried to be.

THE COURT: All right, Miss Donley. You have heard Mr. Nageotte say it was his understanding or that he was told this was not a violation or led to believe that burying that canal or ditch or river, or whatever it was, was not a violation.

[1742] MISS DONLEY: He was not led to believe that it was not a violation, Your Honor.

THE COURT: What was he led to believe?

MR. NAGEOTTE: Well, not—

THE COURT: Just a minute, Mr. Nageotte. I'll handle that.

MR. NAGEOTTE: In this case, Your Honor—

THE COURT: Mr. Nageotte, I'll handle it.

You are not to examine Miss Donley. I am.

Miss Donley, what was the situation?

In all candor and fairness, what did you indicate to Mr. Nageotte?

MISS DONLEY: When we initially filed the litigation,—

THE COURT: Yes.

MISS DONLEY: —we had not been allowed on the property at that time. The United States Government representative had not been allowed on the property.

THE COURT: I'm not asking all that. I'm asking what were—

What did you indicate to the defendant and to Mr. Nageotte were the violations with which he could be charged with answering?

MISS DONLEY: We talked to him about the wetlands.

We talked to him about discharging pollutants into [1743] navigable waters.

I can see now that Mr. Nageotte, from what he said—that his interpretation was that if a person discharged fill—

THE COURT: All right. Let me ask you a question. Is Section C—

Did you ever put that in the hatched area?

I don't see any hatches on Section C.

Am I to understand if it's not on a hatched area Mr. Tull—

Is that your position?

MR. NAGEOTTE: That's my position, Your Honor, and that's what we—

THE COURT: So, we don't have to worry—

He can go ahead and fill Section C and sell it even if it's under water; is that right?

MR. NAGEOTTE: Well—

THE COURT: Is that your position?

I want to find out if that's your position.

MR. NAGEOTTE: Well—

THE COURT: Forget the waterway a minute. I'm now concerned about Section C.

It wasn't shown on the hatched areas?

MR. NAGEOTTE: Your Honor, it wasn't shown on the hatched areas, but it was specifically added by agreement of the—not necessarily agreement, but—

[1744] THE COURT: What agreement?

MISS DONLEY: There wasn't an agreement.

MR. NAGEOTTE: Miss Donley—

MISS DONLEY: It was an amended complaint.

THE COURT: An amended complaint?

MR. NAGEOTTE: Amended complaint.

MISS DONLEY: There was an amended complaint, and Mr. Nageotte responded to the amended complaint.

MR. NAGEOTTE: And that didn't have anything about the waterway on it, Your Honor, and I asked—I asked—

THE COURT: Was the section which contains the waterway through it part of the Ocean Breeze's complaint?

MISS DONLEY: Yes. It was Ocean Breeze. Ocean Breeze Section B.

THE COURT: I don't know what to do with it concerning—

Right now we're just going to listen.

MISS DONLEY: It's part of the original complaint.

THE COURT: It's not part of any other suit?

MISS DONLEY: No; it's not part of any other suit.

THE COURT: The Army Engineers—did they decline to take any action with regard to it?

MR. NAGEOTTE: Yes, sir.

THE COURT: Is that what this testimony is to show?

MISS DONLEY: This testimony is to clarify—

[1745] THE COURT: I can't know what it's going to say until we hear the testimony.

I'm going to hear the testimony.

What is your motion in relation to this, Mr. Nageotte?

MR. NAGEOTTE: Your Honor, my motion is any evidence concerning the ditch is not relevant because it's not a part of this case.

THE COURT: All right. In that case, I will listen to what—

Now I'm placed in a position where I have to listen to determine what the Army Engineers said that would tend to mislead Mr. Tull and Mr. Nageotte. So, we'll go ahead and listen to it.

If it shouldn't be, we'll dismiss it all and we won't consider it, Mr. Nageotte.

I don't know what they—

They must have—

Bring Mr. Hume back in here and let's get on with it. Let him tell us about this.

If it shouldn't be considered, we'll strike it all, Mr. Nageotte. That's all I can tell you, but I have got to

hear it to know whether it is or is not material, unfortunately.

* * * *

[1935] MISS DONLEY: —and the possible remedy in this action.

THE COURT: And who else?

MISS DONLEY: And then the person about the photograph.

MR. KANE: To identify that last photograph I used,—

MISS DONLEY: The last photograph.

MR. KANE: —the Bunker Hill photograph.

THE COURT: All right. You have got Mr. Tull, which I estimate is going to take almost a half a day, almost three quarters of a day, knowing Mr. Nageotte's going to get every nickel he can in your case. So, I would say it would be close to a day on Mr. Tull alone.

That's just my guess.

All right. Now I know where we're going.

I don't see any great problem.

The last question is: Can we settle this case?

Mr. Nageotte, you can't think of any way you could settle this case?

It's going to cost your client a ton if he loses. If he loses,—I'm not saying he is, but I'm just going to say if he loses—it's going to cost you a ton.

Now, the government—

[1936] You've got some real hurdles to overcome.

Remember the burden is on you-all, and you might not be able to prove certain things.

You just might not be able to prove it.

No need being adamant. If you can get yourself some wetlands back, I'd try to grab 'em and go.

MR. NAGEOTTE: Judge, I can honestly say again whatever penalty Your Honor would—

Even if my client lost this case, whatever penalty in your wildest dreams you could impose would not be worse than what the government wants,—

THE COURT: All right.

MR. NAGEOTTE: —and in those facts, Your Honor, there's hardly any way to settle.

THE COURT: All right. In that case—

I can't believe that,—

MR. NAGEOTTE: Well—

THE COURT: —because I am a mean, onery old soul. You just haven't seen me.

MR. NAGEOTTE: Well—

THE COURT: I believe in the government getting back money, Mr. Nageotte,—

MR. NAGEOTTE: Well—

THE COURT: —and the way I can get it to 'em—I'm better than the Internal Revenue Service. I can tell you [1937] that.

I pay a lot of taxes, and I don't have many deductions in this job. I'm finding that out quickly.

I used to have a lot of 'em in that old job.

MR. NAGEOTTE: Well, I hope Your Honor's position won't affect your thinking in this case.

THE COURT: I'll try not to make it affected to much.

* * *

[2203] Q And how many times have you developed some sort of mitigation or restoration plan—

A Several hundred.

Q —at these locations?

A Several hundred.

Q Have you been—

Are you familiar with the sites in this suit?

A Yes; I am.

Q Do you have a rough concept of the acreage, for example?

A Yes; I do.

Q Knowing what you know about the fill activities that have been engaged in on these sites, do you believe it's possible to develop a restoration plan for these sites?

A Yes; I do.

Q Would you explain the general process of developing a restoration plan?

A Well, after reviewing the actual unauthorized activity—

MR. NAGEOTTE: I'm going to have to object here, Your Honor.

THE COURT: Well, how is this admissible?

How is his idea of a restoration plan admissible? [2204] Under what theory?

I'm confused.

MISS DONLEY: Your Honor, when—

Normally when—

Normally these cases are heard as bifurcated cases, but when they are not—

THE COURT: What you are saying is, since you claim that areas that were filled are now in the hands of third parties, and in an equity court it would be impossible to return 'em to the condition they were in, that some other plan must be utilized?

MISS DONLEY: No, Your Honor.

We believe that Your Honor certainly would have the authority to require the properties that are actually the subject of this litigation—to have those returned to wetlands if Your Honor required it. However, —

THE COURT: You mean—

MISS DONLEY: —we also—

THE COURT: You mean to say you think I would tell somebody who has a trailer out there: "You have the trailer, but, unfortunately, we're now going to dig up everything. We're going to leave the sewer line there and the water line there, and you can put your trailer up on stilts"?

MISS DONLEY: Your Honor, what I said was that the United States believes that you have the authority to do that. [2205] Whether Your Honor would do that is another question.

THE COURT: Where do you find that any Court has that authority?

MISS DONLEY: Because the United States' position is—

THE COURT: Forget the United States' position.

Where does the due process to a current owner of the lot come in?

MISS DONLEY: The current owner of the lot would have an action against the developer for the damages that had been caused to him.

THE COURT: We would be taking something away from the current owner, then, wouldn't we?

Shouldn't he be entitled to have his day in court?

* * *

[2239] MR. NAGEOTTE: Your Honor, at this time I would move for a directed verdict and summary judgment for the defendant upon the following issues and upon the following grounds—

First, Your Honor, I would like to move for a directed verdict and summary judgment on behalf of the defendant with respect to any claims concerning the drainage ditch through Ocean Breeze, which is on a number of the government's exhibits, on the following grounds—

If I may refer, Your Honor, to the complaint in this case, the complaint in this case concerns Ocean Breeze [2240] in Count 1 of the complaint.

Count 1 of the complaint, Paragraph 10, if I may refer to that and read it to Your Honor, states that:

"Defendant owns and/or controls"—that is Paragraph 8—"real property on Chincoteague Island, specifically a real property commonly known as Ocean Breeze Mobile Home Sites, Ocean Breeze Mobile Home Sites Section B, Ocean Breeze Mobile Home Sites Section C, adjacent to Fowling Gut and Black Point Drain, two waterways connected to Chincoteague Channel and Assateague Channel, respectively."

Paragraph 10 of the complaint specifically sets out as follows—and this is the amended complaint I'm reading from:

"Commencing on or about September 28, 1977, and continuing to the present time, at specific times best known to the defendant, defendant discharged or caused to be discharged pollutants, consisting of sand, dirt and other fill material, using trucks and other discrete conveyances into the wetlands on the real property described in Paragraphs 8 and 9 above. Plaintiff further alleges that unless enjoined by this Court defendant will continue to discharge pollutants onto the wetlands described in Paragraph 8 above."

If I can refer, Your Honor, to the government's [2241] evidence in this case, which at this point in time must, as Your Honor is well aware, be taken in the light most favorable to the government, there is no evidence put before this Court by the government in its case in chief that Mr. Tull or anyone acting for or on behalf of Mr. Tull placed any fill material into what Your Honor refers to as the canal and what I refer to as the drainage ditch.

THE COURT: Mr. Tull, himself, said he put it in there.

MR. NAGEOTTE: Not after September 28th, 1977, Your Honor,—

THE COURT: Good point.

MR. NAGEOTTE: —and that's what's alleged in the complaint, and that's what we're joined on the issues for in this case. It's after September 28th, 1977.

I would refer Your Honor to Government's Exhibit—
And may I come up and show Your Honor which—

THE COURT: You don't have to. Just refer to it.

MR. NAGEOTTE: Government's Exhibit 29 is one of them, and the other one is—

And I get these—

THE COURT: All right. What is 29?

MR. NAGEOTTE: 29 was the aerial photograph used by Sipple to designate—

THE COURT: What you are saying is this canal was [2242] filled in prior to September, 1977, is that correct?

MR. NAGEOTTE: Not only that, Your Honor, but it is clearly shown on Exhibit 29, and also on, I believe, either Government's Exhibit 1—

If I could come up there, I could show Your Honor better, but these two exhibits are clearly dated September 28, 1977.

THE COURT: There isn't any question about Government's Exhibit 1. It's shown there, and Mr. Tull did fill it.

There it is.

There you go.

MR. NAGEOTTE: And that photograph shows it completely filled, and the date of that photograph is September 28, 1977.

That's Government Exhibit 1 and 1-A.

THE COURT: That's correct.

MR. NAGEOTTE: And Government Exhibit 29, Mr. Sipple's photograph, aerial photograph, shows precisely the same thing, Your Honor.

THE COURT: I think the evidence is fairly clear that the major portion, if not all, of the fill that was put into that ditch that I found was 40 feet wide and roughly six feet deep was done prior to September 28, 1977. The major portion of it certainly was done prior to September 28, [2243] 1977, in accordance with the evidence here.

MR. NAGEOTTE: If that's the case, Your Honor, we submit that with respect to that particular part of the case it should go out on the directed verdict or motion for summary judgment.

THE COURT: What's your next argument, sir?

* * *

[2279] THE COURT: All right, Miss Donley.

Tell me about the drainage ditch, Miss Donley. How does it fit under the complaint?

He called it a drainage ditch.

That ditch is 40 feet wide and six feet deep. It's just a little bit bigger than the Dismal Swamp Canal.

Tell me about that ditch that he filled on.

[2280] Why is it that you can complain about it right now?

MISS DONLEY: Your Honor, initially, several points I'd like to make about the drainage ditch.

THE COURT: Well, start with that point, because I'm going to follow the way Mr. Nageotte raised the points.

MISS DONLEY: Yes.

THE COURT: Now, how can you complain about that under the pleadings?

MISS DONLEY: The pleading in Paragraph 10 says: "Commencing about"—

We didn't—

We used a different characterization—

THE COURT: Let's be frank about it. The situation is that in 1977 anybody looking at any aerial photograph would have known that ditch had been filled in.

Is that correct?

MISS DONLEY: Yes.

THE COURT: All right.

Now, what is your position with regard to the drainage ditch?

MISS DONLEY: The evidence that we have put into this case—

My first point was the fact we used "Commencing about".

The evidence we have put into this case so far [2281] indicates that the drainage ditch was filled roughly 1976, late 1975.

THE COURT: That's about right.

MISS DONLEY: Under Rule 15(b), we can move at anytime to have the pleadings conform to the evidence whenever it makes substantial justice.

THE COURT: All right. Is that what you are moving to do?

MISS DONLEY: Yes, because it is already in evidence in the case.

THE COURT: All right. We'll consider that.
Move on to your next point.

* * *

[2324] PROCEEDINGS

THE COURT: Good morning.

I'm sorry I am a little late. I had a little sentencing this morning that created a problem. It took a little longer than we thought.

Now, first, I am going to reopen the plaintiff's case and allow the plaintiff to reopen her case. I'm going to grant leave to the plaintiff to amend as to Count 1, that is, as to the Ocean Breeze allegations.

Insofar as Count 1 is concerned, I'm going to allow the amendment of the pleadings in relation to Ocean Breeze to amend to allege the filling of the alleged canal, drainage ditch, or Fowling Gut, whatever one calls it.

In relation to that, I think that the defendant ought to be given a fair opportunity to answer that portion, and, therefore, I am going to continue the matter with regard to allegations concerning Ocean Breeze and sever Ocean Breeze from this trial.

We will continue on with this trial with regard to Mire Pond and Eel Creek, that is, Counts 2 and 3, as well as Count 4, but we will not continue on this trial with regard to Ocean Breeze, but we're going to set it down immediately for trial—

Would you get Mrs. Gunn in here? [2325] —as to that particular count, and we will proceed to do that.

I'm sorry, but I feel that in relation to this canal—to me, it becomes patently obvious, especially in relation to the remaining testimony, that it should be reconnected; that, whatever it's called, it presents a serious question whether it should or should not, and I haven't heard any defendant's evidence at this time, and I don't want to say anything, but the ends of justice—and I find that the ends of justice—would best be served by allowing the amendment.

I'm not going to put Mr. Nageotte to the problem of having to answer it today. So, we're going to set a trial date right now for it, however, and it's going to be very short.

I'm going to move this thing to a conclusion,—

THE LAW CLERK: She's coming.

THE COURT: —if I possibly can.

All right, Mr. Nageotte. Do you want to say—
I saw you moving.

Did you want to say something about it?

MR. NAGEOTTE: Yes; I do, Your Honor.

THE COURT: All right.

MR. NAGEOTTE: Before I say anything, Your Honor, I would like a clarification on Your Honor's ruling.

[2326] Your Honor said you were going to sever all of Count 1, and we have witnesses coming today to testify to other areas of Count 1.

THE COURT: Well, I'll be glad to hear that. I'll accommodate you on that part, but I just don't want to—

I'll be glad to hear all of that so you don't run into any problem.

I don't want to punish you in any way, and I am not trying to, and I don't want to force your hand in any way.

I'll be glad to accommodate you in any way possible. I want to be fair to you, but I don't want to start going—

I don't want to put this whole case off because of this matter.

MR. NAGEOTTE: At that point, then, Your Honor, I would have to again move for a mistrial in this case upon the—

THE COURT: Well, Mr. Nageotte, I won't hear your evidence, then, if that's what you want me to do.

You know, I am trying to accommodate you. I'll accommodate you any way you want to be accommodated.

Now, if you don't want me to hear the evidence, I won't hear the evidence. If you want me to hear the evidence, I will hear the evidence. But I won't have you moving for a [2327] mistrial because I'm accommodating you.

MR. NAGEOTTE: No, Your Honor.

THE COURT: Do you understand what I'm saying?

MR. NAGEOTTE: That's not the grounds for my motion.

THE COURT: Oh, excuse me.

MR. NAGEOTTE: With all due respect, sometimes Your Honor predetermines what I'm going to say.

THE COURT: All right.

MR. NAGEOTTE: I'm not moving for a mistrial on the fact that Your Honor is accommodating me by hearing other evidence other than the canal, the drainage ditch, with respect to Ocean Breeze.

I'm moving for a mistrial at this time on the basis that it's clear to me from what has occurred in this case that Your Honor has taken upon yourself to try certain aspects of this case which were not originally a part of the case or part of the pleadings. I feel it can only come as a result of Your Honor's view. Since the view Your Honor has been very clear that this drainage ditch, which has not—which no evidence was presented concerning—

There has been no evidence—no witness testified—concerning the drainage canal being a violation.

I had done great discovery in this case, and I have all the discovery here. This morning I have been through it. [2328] I would like to point out to Your Honor in my original interrogatories in this case I specifically asked the government what their claims were, what they claimed jurisdiction over, what they claimed violations to be.

My interrogatory—

THE COURT: I will instruct the government to further amplify those interrogatories, Mr. Nageotte,—

MR. NAGEOTTE: Well, Your Honor—

THE COURT: —within 10 days.

MR. NAGEOTTE: Your Honor—

THE COURT: I'll give 'em two weeks, because 10 days might end up eventually two weeks, anyhow.

Two weeks from today.

Okay. What else, Mr. Nageotte?

MR. NAGEOTTE: Well, I would like to put this on the record, Your Honor. I think it's—

THE COURT: I want you to put it on the record.

MR. NAGEOTTE: My Interrogatory 8, 9 and 10—I'm sorry.

Interrogatory 7, 8 and 9 went into specific details, asking the government to specify the areas of their jurisdiction and their complaints and claims in this case. In each instance they—while their answer was not fully complete, it alleged filling of marshlands. It specifically addressed filling of marshlands. As a result of the [2329] incompleteness of the answer, I went before Judge MacKenzie on a motion to compel, and my motion to compel on those interrogatories—

Excuse me, Your Honor. It's Interrogatory 6, 7 and 8.

6, 7 and 8 are the interrogatories I'm addressing in this motion.

My motion to compel was filed within a few days of the 18th of March, 1982.

I don't have the exact date it was filed. That was the date I mailed it.

A hearing was held on this before Judge MacKenzie on April the 2nd, 1982, and I have a transcript of that hearing, and with regard to my Interrogatories 6, 7 and 8 Judge MacKenzie said that I would be provided that information in depositions of the government witnesses, and that area in the hearing transcript starts on Page 28 and runs forward.

As a result of Judge MacKenzie's ruling, I took the depositions of all government witnesses who the government indicated in their response to interrogatories had any knowledge concerning the allegations that were the subject of this case. In not one of those depositions did

any witness allege that this canal or drainage ditch that Your Honor has focused on from the day of your view in this case was an [2330] issue in this case. Their pleadings didn't make it an issue.

Your Honor, this Court has made it an issue, and as far as the government was concerned, from the plaintiff's side of the case, irrespective of Miss Donley's representation, when she observed during trial that Your Honor was focusing on this as an issue, she made it an issue at that point.

Now, a defendant has a hard enough time in any trial to defend against the charges brought against him without the trial Court coming up with charges or coming up with complaints that the government, itself, did not want to bring.

Now, with all due respect to Your Honor—and I must say I personally admire Your Honor very much, and it's very difficult to say this on the record, but in fairness to my client I must—Your Honor has a tendency in this trial to jump to conclusions on little evidence, and that's exactly what's happened here. Your Honor has jumped to a conclusion about this drainage ditch. You have focused on this. You have spent much time focusing on this issue that was a nonissue in the pleadings and in the case until Your Honor focused on it, and now Your Honor has gone so far as to, in effect, make it a part of the government's case when the government didn't originally make it a part of its own case, and this creates a grave problem when the trial Court becomes [2331] involved in effecting the pleadings in the case, of bringing up and putting issues in the case that were not originally in the case, when the government—

Then when the defense seeks to take those issues out of the case the Court brings them in by granting a motion to amend, made after a motion for directed verdict and summary judgment, not before, and reopens the plaintiff's case.

Your Honor, I would submit, has shown what I consider to be some very dangerous tendencies as far as being a neutral arbiter and Judge in this case.

Your Honor has in effect, accused Mr. Tull of lying on the witness stand or not telling the whole truth on the witness stand when there was no evidence to support it.

Your Honor made comments like if that proved to be incorrect Your Honor would reopen the trial; Your Honor would do this, and assess costs against him.

Your Honor has already gone into areas such as people who trucked to Chincoteague. Your Honor wanted to know all the people who trucked to Chincoteague in the last five years.

Now, I had a lot of problems with that and I objected to that at the time, Your Honor, and I could understand Your Honor's question. It would be a valid question if it had been related to these properties in issue, but it had no tie or relationship to these properties in [2332] issue.

Your Honor wanted to know everyone who trucked to Chincoteague in the last five years, and I know that Your Honor does not ask questions to waste time. Your Honor is constantly on the attorneys who ask questions that waste time. Your Honor had a purpose in this question, and Your Honor has got something in your mind about why you asked that question, and I don't know if Your Honor intends to tie this case into broad-sweeping issues of the entire Island of Chincoteague and what occurs there and that somehow this defendant is a part of that and this is a practice that has to be either crushed because it's not what the government wants or perhaps even, in all fairness, a practice that Your Honor considers wonderful because it provides employment in these economically hard times, but in either way, Your Honor, whether it's to the prejudice of the defendant or to the prejudice of the government, it's still to someone's prejudice. It expands the case beyond what the case is.

There's clearly a reason for it, and I would find it hard to believe that it would be to any benefit of the defendant and not to his prejudice.

Counsel has not had an opportunity to go out and determine if these are broad-ranging social-economic problems that affect the entire Island and what evidence we would have to put on if Your Honor has got thoughts about it, [2333] because Your Honor, as I said, did not tie it to any of these properties. It was just a broad-ranging question.

Your Honor has, with all due respect, many times during the trial heard a bit of evidence and then jumped to a conclusion.

Your Honor has done this in other areas, but particularly this concerns me about this canal.

Your Honor has even gone so far as to make statements that this is a serious, serious thing. You have not believed Mr. Tull when he's tried to tell you that that canal was blocked prior to his ever filling it, and if Your Honor really looks at the photographs I can show you where you can clearly see it was blocked. You can see it right on the photographs, and yet Your Honor made a thing—

Well, you go back to Chincoteague and you find out, and is Mr. Tull really telling the truth about that?

And yet I can show Your Honor right on the photographs where it's been previously blocked. You can see where the filling is fresh and new. You can see where the grass is growing over what used to be that canal.

I would submit to Your Honor the handling of this case to this point in the trial makes it clear to myself as a trial attorney that Your Honor has predetermined that you are going to find a violation by filling this drainage ditch even though it wasn't pleaded, even though it wasn't in [2334] evidence. Your Honor is going to force that in this trial, because Your Honor has decided, based on your view, that there's no question that that was water filled, and, therefore, Your Honor has decided that you're going

to do something about that, and I would submit to Your Honor that you have so taken over the case with respect to this drainage-ditch issue from the standpoint of the government that Your Honor can no longer sit in this trial and be an independent arbiter and an independent Judge that can render a fair and impartial decision to both sides.

Your Honor is now clearly on the side of the government with respect to this drainage-ditch issue, and, no matter what evidence is come up with, Your Honor is not going to change your mind or change your thinking about it, and that's a significant issue, Your Honor, because you have made statements from the bench that Mr. Tull still owns roads, roads that are paved, roads that are obligated to be turned over to the state highway system. Your Honor said, well, you could run that canal down the road and make him put expensive bridges up; you could run that down the drainage ditch. He doesn't own the drainage ditch. He owns perhaps an easement in it, but he doesn't own the ditch, and it's clear to me that Your Honor is so steadfast in your determination that you're going to find a violation on this canal even though none was alleged, and you're going to make [2335] him do something about it, and Your Honor just said it again,—you're going to get that open somehow—and, Your Honor, I submit at this point in the trial you clearly—clearly—can no longer hear this trial and render a fair and impartial verdict for the defendant.

And on that grounds, Your Honor, I say that the motion for a mistrial is extremely well taken.

THE COURT: All right.

Now, so, you are making a motion for a mistrial on the basis that you feel that what the Court has seen may have predetermined this issue.

I haven't predetermined the issue.

I'll put it for the record.

However, if you want to bring something to my attention, I want to see it. I always want to see any evidence.

You said something about you could see it clearly blocked. All you have to do is refer to the exhibit number. I'll be glad to consider it.

Now, what is the exhibit number you are referring to, sir?

MR. NAGEOTTE: May I get it from the Clerk, Your Honor?

THE COURT: Yes, sir.

MR. NAGEOTTE: I looked at it this morning. I don't [2336] know the number without looking at it.

By the way, Your Honor—

THE COURT: I just asked to get the picture.

MR. NAGEOTTE: I understand, but I'm telling Your Honor these photographs—

The government sticker was put over the date on these photographs, and we have agreed to put the dates where someone can read them so you know what dates the photographs were taken.

THE COURT: Just refer to the exhibit number.

MR. NAGEOTTE: Yes, sir.

THE COURT: I'll be glad to look at the picture.

MR. NAGEOTTE: It's Exhibit 45, Your Honor.

It was 46, but that was scratched out and it's Exhibit 45, and you can clearly see where the fill is, and you can clearly see where the green areas are grown across the canal, which indicate it was an old fill or old blockage.

MISS DONLEY: The date of the photograph is in the pretrial order. It's August, 1976.

THE COURT: The date of this photograph?

MISS DONLEY: Yes,—

THE COURT: All right.

MISS DONLEY: —if that is Number 45.

THE COURT: I have looked at the photograph.

The motion for a mistrial is denied.

Rule 38. Jury Trial of Right

(a) **Right Preserved.** The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) **Same: Specification of Issues.** In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

May 27, 1986

No. 85-1259

EDWARD LUNN TULL

v.

UNITED STATES

The petition for a writ of certiorari is granted. Limited to Question 1 presented by the petition.